SUPREME COURT, U.S.
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No. 98-50

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

KEWEENAW BAY INDIAN COMMUNITY,
Petitioner,
vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES DEPARTMENT OF JUSTICE, AND THE STATE OF MICHIGAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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80 pp

QUESTION PRESENTED

Whether a compact between a State and an Indian Tribe that expressly defines the locations where Indian gaming may be conducted "regulates" that gaming for purposes of section 2719 of the Indian Gaming Regulatory Act of 1988 which otherwise would require concurrence by the State's Governor in a "best interest" determination by the Secretary of the Interior.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Keweenaw Bay Indian Community respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 136 F.3d 469 (6th Cir. 1998) and is reproduced in the Appendix (App., *infra*, A-1—A-12). The first opinion of the district court is reported at 914 F.Supp. 1496 (W.D. Mich 1996) and is reproduced in the Appendix (App., *infra*,A-13—A23). The second opinion of the district court is reported at 940 F.Supp. 1139 (W.D. Mich 1996) and is reporduced in the Appendix (App., *infra,* A-24—A33).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on February 10, 1998 (App., *infra*, A-35). The court of appeals denied the Keweenaw Bay Indian Community's Petition For Rehearing on April 1, 1998. (App, *infra*, A-34). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Service is being made on the Solicitor General of the United States as required by Rule 29.4a.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 2710

(set forth in the Appendix)

25 U.S.C. § 2719(a)-(b). Gaming on lands acquired after October 17, 1988.

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless —

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and –

(A) such lands are located in Oklahoma and –

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when —

(A) The Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of —

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

STATEMENT OF THE CASE

On August 20, 1993, the Keweenaw Bay Indian Community ("Community" or "KBIC") and the State of Michigan entered into a tribal-state gaming compact pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* That compact authorizes Class III gaming, as defined by the IGRA, on "any lands title to which is ... held in trust by the United States for the benefit of the Tribe" and on "all lands currently within the limits of the Tribe's Reservation." (App., *infra*, A-49—A-50). All conditions necessary to implement the compact, including approval by the Secretary of the Interior of the United States, have been fulfilled. 58 Fed. Reg. 83,262 (Nov. 30, 1993).

The Community now operates two gaming facilities pursuant to the compact, only one of which is at issue here. That facility is located on approximately 20 acres of tribal reservation land amidst 40 units of tribal housing in Marquette County, Michigan and is only 75 miles from the seat of the Community's government. It is an important part of the local community, employing some 250 people, including many non-Indians. It provides vital revenue not only to KBIC, but also to local and state governmental programs through a revenue sharing agreement. The Marquette County Board of Commissioners recently voted 9-1 in favor of keeping the gaming facility open at its present location.

The Community acquired title to the Marquette County parcel on

October 14, 1988, before the IGRA was enacted. (App., *infra*, A-2). On September 24, 1990, the land was taken into trust by the United States for the benefit of the community (*Id*).

Under the Community's Constitution, the land became part of the Community's reservation on the date that it was taken into trust. The Community's Constitution provides, in relevant part, as follows:

> The territorial jurisdiction of this Constitution shall embrace the land within the original boundary lines of the L'Anse Reservation as defined pursuant to treaty dated September 30, 1854, (10 Stat. 1109), and any and all future additions of land acquired within or without said boundary line by the Secretary of Interior, except as otherwise provided by law.

Article 1, Keweenaw Bay Indian Community Constitution.

In August of 1994, the Community informed the Bureau of Indian Affairs of the Department of the Interior of its intent to conduct Class III gaming on the Marquette County land. The Bureau of Indian Affairs took the position that the Community must first submit to the procedures set forth in 25 U.S.C. § 2719(b)(1)(A), which requires a determination by the Secretary of the Interior that gaming is in the best interest of the tribe and not detrimental to the surrounding community. The Governor of the state must concur with that determination.

Believing the terms of the compact clearly allowed gaming on the Marquette County land, the Community disagreed with the government's position, opened a Class III gaming facility on the land, and filed the instant lawsuit in the United States District Court for the Western District of Michigan seeking declaratory and injunctive relief and damages.[1] The federal defendants filed a counterclaim seeking declaratory and injunctive relief (App., *infra*, A-3).

The district court, exercising its jurisdiction pursuant to 28 U.S.C. § 1331, decided the case on the parties' cross motions for summary judgment and granted the Community's motion. The district court determined that 25 U.S.C. § 2719, by its own terms, applies only to gaming "regulated by the [Indian Gaming Regulatory Act]" (App., *infra*, A-20—A-22). The district court also determined that gaming conducted

pursuant to a tribal-state compact is not gaming "regulated by the [Indian Gaming Regulatory Act]," because 25 U.S.C § 2710(d)(2)(C) makes such gaming "fully subject to the terms and conditions" of the compact. (*Id.*). The district court expressly rejected the federal defendants' contention that all Class III gaming is regulated by the Act, and that 25 U.S.C. § 2719 applies to all Class III gaming on land taken into trust after October 17, 1988, the effective date of the Act. (*Id.*).

Accordingly, the district court entered summary judgment in favor of the Community.

The federal defendants moved the district court for reconsideration of its judgment, and the State of Michigan intervened in the case and also moved the district court for reconsideration of its judgment. The district court denied these motions (App., *infra*, A-24—A-33).

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court. The court of appeals held that all Class III gaming is regulated by the IGRA, and that the provisions of 25 U.S.C. § 2719 apply to all Class III gaming on off-reservation lands taken into trust after October 17, 1988, whether or not the gaming is authorized by a tribal-state compact (App., *infra*,A-5—A-9).

The Community sought rehearing of the court of appeal's decision. Specifically, the Community requested that the court of appeals clarify its opinion with regard to whether the approval of a compact by a Governor could constitute a concurrence by the Governor under 25 U.S.C. § 2719, as this issue had not been considered by the district court or briefed by the parties. The court of appeals denied the Community's petition for rehearing on April 1, 1998 (App., *infra*, A-34). The arguments included in the petition for rehearing are not within the scope of the question presented to this Court and will be litigated on remand if necessary.

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1 Despite its belief that the section is inapplicable, the Community also filed an application with the Department of the Interior for a Secretarial determination under § 2719(b)(1)(A). That application languished in the Department during this litigation, but is still pending and again is moving forward.

REASONS FOR GRANTING THE PETITION

The plain language of the tribal-state compact explicitly authorizes Class III gaming on the Community's Marquette County land. As of the compact date, August 20, 1993, the Marquette County parcel fell within the explicit definition of "Indian lands" in the compact: "any lands title to which *is* ... held in trust by the United States for the benefit of the Tribe." (emphasis added). The land was taken into trust by the United States almost three years before the compact was executed.

Since the proper locations for Indian gaming are included in the compact, that issue now is regulated by the compact. As the IGRA states, once a compact has been concluded, "Class III gaming ... shall be fully subject to the terms and conditions of the Tribal-State compact." 25 U.S.C. § 2710(d)(2)(C).

On the other hand, section 2719(a) of the IGRA provides that only "gaming regulated by this chapter" is subject to the restrictions on gaming on lands taken into trust after October 17, 1988. Once a tribal-state compact assumes regulation of the locations on which Indian gaming is allowed, that gaming, at least with respect to location, is no longer "regulated" by the IGRA, but rather by the compact. Under the circumstances here, therefore, § 2719 is inapplicable and the Community need not satisfy one of the exceptions set out in § 2719(b). This result is in accord with the wishes of Congress that tribal-state compacts become the primary vehicle for regulation of Class III gaming.

In this light, the Sixth Circuit's decision wrongfully diminishes the central importance of the tribal-state compact in the statutory scheme, conflicts with decisions in other circuits, and is contrary to the Congressional policy underlying the Indian Gaming Regulatory Act. Clarification by this Court is necessary to provide guidance to Indian tribes and States which are now or in the future may be engaged in gaming compact negotiations.

By holding that all Class III gaming authorized by a compact is gaming "regulated" by the Indian Gaming Regulatory Act, the Sixth Circuit essentially determined that a tribe and a state may not, in the context of compact negotiations, consider or address Class III gaming on off-reservation land taken into trust after the effective date of the Act. In contrast, the Seventh Circuit has recognized that the location of tribal gaming facilities on Indian lands is an appropriate matter for tribes and states to address through the compact process.

> Although the parties put great energy into other arguments, the central issue in this case is whether the compact the State of Wisconsin and the Winnebago Nation entered into in June 1992 includes within its scope the land in Dane County. The Winnebago Nation and the State of Wisconsin are bound by the terms of the compact ... Thus, if that compact resolves the question whether Class III gaming may be conducted on the Winnebago Nation's land in Dane County, the tribe is bound by that agreement – regardless of how this court might resolve the parties' other arguments.

Wisconsin Winnebago Nation v. Thompson, 22 F.3d 719, 723 (7th Cir. 1994) (citation omitted).

In addition, the First Circuit has held that "the tribal-state compact is the exclusive method of regulating Class III gaming." *Rhode Island v. Narrangansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919, 115 S.Ct. 298, 130 L.Ed.2d 211 (1994).

The Sixth Circuit's decision is also contrary to the policies underlying the Indian Gaming Regulatory Act and the choice made by Congress to use the compacting process. Congress realized that states have an interest in gaming activity occurring within their borders. Congress selected the compact process as the means to balance the competing tribal and state interests.

> After lengthy hearings, negotiations and discussions, *the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises* such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of Class III gaming be respected *on Indian lands where, with few exceptions, such laws and regulations do not now apply.* The Committee balanced these concerns against the strong tribal opposition of State jurisdiction over activities on Indian lands. The Committee concluded that *the compact process is a viable mechanism for settling various matters between equal sovereigns.*

S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988) ("S. Rep. 100-446"), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added).

Citing this portion of the legislative history, one court summarized the importance of the compact:

> The essential feature of the Act is the tribal-state compact process, the means Congress devised to balance the states' interest in regulating high stakes gambling in their borders and the Indians' resistance to state intrusions of their sovereignty. The structure of the Act conforms to the basic principle that the states and tribes negotiate as sovereigns. *See* S. Rep No. 100-446, 100th Cong., 2d Sess. at 13.

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. 480, (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992), cert. denied, 506 U.S. 829, 113 S.Ct. 91, 121 L.Ed.2d 53 (1992).

Congress also acknowledged that Class III gaming could not be regulated effectively by the federal government and that this was a further reason for giving States the primary regulatory role through the compact process.

> The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for states to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. *Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for Class III gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems,* although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of Class III gaming — many can and will.

S. Rep. 100-446 at 13-14 (emphasis added). Thus, Congress conceded that Class III gaming could ***not*** be regulated by the federal government. Therefore, the phrase "regulated by this chapter" in § 2719 should not be applicable when, as here, the state has explicitly assumed the regulatory role envisioned by the Congress and has chosen to include and exclude certain types of land in the compact's definition of permitted gaming locations.[2]

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2 One can readily imagine that the State, and the United States, would be taking a contrary position regarding the force of the compact had the compact *excluded* from the definition of "Indian lands" parcels which the IGRA would otherwise allow to be used for gaming.

Congress intended that tribal-state compacts be the "exclusive method of regulating Class III gaming," *Narragansett, supra, 19 F.3d at 689,* and that once a compact has been entered, "Class III gaming ... shall be fully subject to the terms and conditions of the Tribal-State compact." 25 U.S.C § 2710(d)(2)(C). Congress also provided that "Nothing in this subsection [relating to tribal-state compacts] shall impair the right of an Indian tribe to regulate Class III gaming on its Indian lands concurrently with the State..." 25 U.S.C. § 2710(d)(5).

Compact negotiations, like any contracting process, involve a balancing of the parties' interests and certain trade-offs. The Community, like other tribes in Michigan, bargained for the specific terms of the compact concluded in 1993, including the "Indian lands" provision. In return it gave up 10% of its revenue to state and local governments, and other jurisdictional rights of significance to any sovereign.

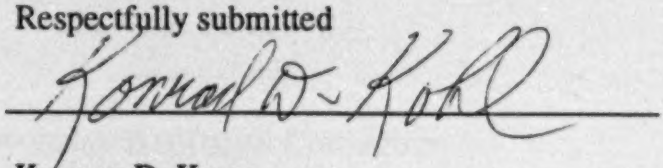
For these reasons, the Sixth Circuit's decision is in conflict with the reasoning used by other circuits when interpreting the importance of tribal-state compacts and contravenes the intent of Congress. Congress structured the IGRA to force tribes and states to come to an agreement about Class III gaming, a process which properly includes appropriate locations. The Community and the State of Michigan did so, and the Marquette County parcel is a lawful gaming site under that compact. Given that agreement, Congress did not intend that IGRA be considered to "regulate" gaming for the purposes of § 2719(a). The compact is enough.

CONCLUSION

For the foregoing reasons, Petitioner Keweenaw Bay Indian Community respectfully requests that this Petition for a Writ of Certiorari be granted.

June 30, 1998

Respectfully submitted



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No. ____

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OCTOBER TERM, 1998

KEWEENAW BAY INDIAN COMMUNITY,
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VS.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES DEPARTMENT OF JUSTICE, AND THE STATE OF MICHIGAN,
Respondents.

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Compact Between the Keweenaw Bay Indian Community and the State of Michigan Appendix-47-62

KEWEENAW BAY INDIAN COMMUNITY,
Plaintiff-Appellee,
v.
UNITED STATES of America; U.S. Department of Interior;
U.S.Department of
Justice, Defendants-Appellants (96-2410),
Bureau of Indian Affairs, et al., Defendants,
State of Michigan, Intervenor-Defendant
Appellant (96-2204).
Nos. 96-2204, 96-2410.
United States Court of Appeals,
Sixth Circuit.
Argued Dec. 9, 1997.
Decided Feb. 10, 1998.

Appeal from the United States District Court for the Western District of Michigan at Marquette. No. 94-00262—David W. McKeague, District Judge.

Keith D. Roberts (argued and briefed), Office of the Attorney General of Michigan, Lansing, Michigan, Edward J. Shawaker (argued and briefed), U.S. Department of Justice, Land & Natural Resources Division, Washington, DC, John M. Cahill (briefed), Office of the Attorney General of Michigan, Lottery and Racing Division, Lansing, Michigan, for Appellants.

Konrad D. Kohl (argued and briefed), Kohl, Harris & Peters, Metamora, Michigan, Joseph P. O'Leary (briefed), Keweenaw Bay Indian Community Tribal Center, Baraga, Michigan for Appellee.

Before: RYAN, SILER, and COLE, Circuit Judges.

Printers Note: Footnotes appear as endnotes beginning on page Appendix-11.

OPINION

COLE, Circuit Judge.

This appeal involves a dispute among an American Indian tribe, the federal government and the State of Michigan regarding the applicability of a particular provision of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. s 2701 et seq., to Indian gaming that is the subject of a tribal- state gaming compact. The district court concluded that the IGRA provision at issue, 25 U.S.C. s 2719, does not apply to gaming that is the subject of a valid tribal-state compact, one of the means of regulating Indian gaming created by the IGRA. The federal defendants-appellants, which include the United States of America, the U.S. Department of the Interior and the U.S. Department of Justice, and the intervenor-appellant State of Michigan appeal the district court's resolution of the declaratory judgment action, arguing that s 2719 applies to all Indian gaming subject to the IGRA, including gaming that is the subject of a valid tribal-state compact. For the following reasons, we conclude that 25 U.S.C. s 2719 applies to Indian gaming that is the subject of a tribal-state compact and we accordingly reverse and remand.

I. FACTS AND PROCEEDINGS BELOW

On October 14, 1988, the Keweenaw Bay Indian Community ("the Community") [FN1] obtained title to a parcel of land in Marquette County, Michigan. Keweenaw Bay Indian Community v. United States, 914 F.Supp. 1496, 1498 (W.D.Mich.1996). The land was taken into trust by the U.S. Government for the benefit of the Community in September 1990. Id.

On August 20, 1993, the Community and the State of Michigan entered into a tribal-state gaming compact pursuant to the IGRA. This compact authorizes Class III gaming activities on the "Indian lands" of the Community within the State of Michigan. [FN2] The compact specified that it would become effective upon the fulfillment of the following four conditions: (1) endorsement by the tribal chairperson after approval by the Tribal Council; (2) endorsement by the Michigan Governor and concurrence in the endorsement by resolution of the Michigan legislature; (3) approval by the Secretary of the Interior of the United States; and (4) publication in the Federal Register. Compact s 11, J.A. 117. Each of these conditions has indisputably been fulfilled. Keweenaw Bay Indian Community v. United States, 940 F.Supp. 1139, 1142 n. 5 (W.D.Mich.1996). In addition, statutory compact requirements were fulfilled. On March 3, 1994, the tribal gaming ordinance promulgated by the Community was approved by the National Indian Gaming

Commission, as required by one of the IGRA compact provisions, 25 U.S.C. s 2710(d)(2)(B). [FN3]

On August 19, 1994, the Community submitted an application to the Department of the Interior for approval of the gaming at issue pursuant to 25 U.S.C. s 2719. In response, the Bureau of Indian Affairs took the position that the Community must submit to the procedures set forth in 25 U.S.C. s 2719 before it could conduct Class III gaming on the land. The Community disagreed with this position and in September 1994, opened a Class III gaming facility on its land in Marquette County, Michigan [FN4] and filed this action for declaratory and injunctive relief to allow Class III gaming on the tract of land. [FN5] The federal defendants counterclaimed, seeking a declaration that the gaming activities conducted at the Community's casino are in violation of state and federal law. The federal defendants also sought an order enjoining the Community from licensing, authorizing or operating Class III gaming on the land until the requirements of 25 U.S.C. s 2719 had been met; it also sought abatement of the gaming and confiscation of the unlawful gambling devices pursuant to state law.

The district court concluded that the IGRA does not require that Class III gaming activities authorized by a tribal-state compact also undergo the approval requirements contained in 25 U.S.C. s 2719. The district court reasoned that Class III gaming authorized and regulated by a tribal-state compact does not constitute "gaming regulated by" the IGRA and thus the gaming at issue was not regulated by s 2719, because it applies only to "gaming regulated by" the IGRA. See 25 U.S.C. s 2719(a) (prohibiting "gaming regulated by this chapter " absent certain statutory exceptions, on non-reservation lands that are not contiguous to a reservation and which are taken into trust by the United States government after October 17, 1988 (emphasis added)). The district court noted that both the Secretary of the Interior and Michigan's Governor had approved the compact and it would be odd for Congress to require the Community to resubmit gaming permitted by the compact to the Secretary of the Interior and the Governor, as would be required if s 2719 were applied. The district court granted summary judgment to the Community. See Keweenaw Bay Indian Community v. United States, 914 F.Supp. 1496 (W.D.Mich. Feb.5, 1996) ("Keweenaw Bay I ").

The federal defendants then moved for the district court's reconsideration of its judgment. The State of Michigan ("State" or "Michigan") entered the picture at this point and moved to intervene in the action and also for reconsideration of the district court's judgment. The district court granted the State's motion to intervene and denied the federal defendants' and the State's motions for reconsideration. Keweenaw Bay Indian Community v. United States, 940 F.Supp. 1139 (W.D.Mich. Aug.27, 1996) ("Keweenaw

Bay II "). In the course of doing so, the district court rejected the alternative contention that the terms of the compact itself provided for s 2719's applicability. The federal defendants and the State of Michigan subsequently filed this appeal.

II. THE IGRA AND RELEVANT PROVISIONS

In California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the Supreme Court sharply limited the power of the states to apply their gambling laws to Indian gaming. An essential element of its decision was that Congress had not acted specifically to make state gambling laws applicable in Indian country. In Cabazon, the Court made clear that Congress had to create for the states any effective ability to prevent or regulate Indian gaming, and in response to Cabazon, Congress enacted the IGRA. See Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 692 (9th Cir.), cert. denied,—U.S.—,— S.Ct.—,— L. Ed.2d—, — U.S. ——, 118 S.Ct. 625, — L.Ed.2d ——, 1997 WL 592436 (U.S., Dec. 15, 1997) (No. 97-449); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 n. 3 (10th Cir.), cert. denied, — U.S. ——, 118 S.Ct. 45, — L.Ed.2d —— (1997). Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land, see Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 1119-20, 134 L.Ed.2d 252 (1996), which included a role for the states in the regulation of Indian gaming, Confederated Tribes, 110 F.3d at 692.

The IGRA divides Indian gaming into three categories, or "classes," with different regulatory schemes for each. Class I gaming encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. s 2703(6). Class I gaming on Indian lands "is within the exclusive jurisdiction of the Indian tribes" and is not subject to the IGRA. 25 U.S.C. s 2710(a)(1). Class II gaming consists of bingo played for prizes, card games and games similar to bingo (e.g., punch boards, instant bingo, and pull-tabs). 25 U.S.C. s 2703(7)(A). Class II gaming does not include any "banking card games, including baccarat, chemin de fer or blackjack" or any "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. s 2703(7)(B). Class II gaming is subject only to tribal regulation and federal oversight by the National Indian Gaming Commission. See 25 U.S.C. s 2710(a), (b) & (c); 25 U.S.C. s 2706(b); Wisconsin Winnebago Nation v. Thompson, 22 F.3d 719, 721 & n. 2 (7th Cir.1994).

Any form of gaming not described as part of Class I or Class II is Class III gaming. 25 U.S.C. s 2703(8). Class III gaming has been referred to

as "high-stakes casino-style" gaming, Pueblo, 104 F.3d at 1549, and "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." Seminole Tribe, 116 S.Ct. at 1119. Class III gaming is subject to, inter alia, 25 U.S.C. s 2710(d)(1), which states: (d) Class III gaming activities; authorization; revocation; Tribal-State compact (1) Class III gaming activities shall be lawful on Indian lands only if such activities are— (A) authorized by an ordinance or regulation that— (i) is adopted by the governing body of the Indian Tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman, (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect. 25 U.S.C. s 2710(d)(1) (emphasis added). [FN6] The IGRA provides that tribes are entitled to engage in all forms of Class III gaming that a state permits for other citizens and requires the states to negotiate in good faith toward the execution of tribal-state compacts. 25 U.S.C. ss 2710(d)(1)(B) & 2710(d)(3)(A).

At issue in this case is whether another IGRA provision, 25 U.S.C. s 2719, is also applicable to Class III gaming that is the subject of a compact. Section 2719(a) generally prohibits gaming regulated by the IGRA on "after-acquired" (acquired in trust by the federal government for the benefit of a tribe after October 17, 1988), off-reservation lands, with exceptions for certain circumstances. The only applicable circumstance is that gaming on such "after-acquired" land is permitted if the Secretary of the Interior determines that gaming on the land would be in the best interest of the Community and not detrimental to the surrounding community, after consultation with state and local officials, including officials of nearby tribes; in addition, the governor of the state must concur in the Secretary of the Interior's determination. See 25 U.S.C. s 2719(b)(1)(A). [FN7]

III. DISCUSSION

A. Applicability of 25 U.S.C. s 2719

We must determine if 25 U.S.C. s 2719, a provision generally prohibiting gaming on certain Indian lands acquired after October 17, 1988 absent certain exceptions, applies to Class III gaming when the land is the subject of a valid tribal-state compact which permits Class III gaming on the land. In other words, when a tribe enters a valid, approved state-tribal compact for Class III gaming, is the gaming also governed by 25 U.S.C. s 2719, or are the statutory provisions related to the compact procedures the only IGRA provisions governing the gaming?

We review de novo orders granting summary judgment based on the interpretation of a federal statute. United States v. Stephens, 118 F.3d 479,

481 (6th Cir.1997). Also presented are appeals from the district court's denial of the Fed.R.Civ.P. 59(e) motions to reconsider. [FN8] We typically review denials of such motions for an abuse of discretion, but where a Rule 59(e) motion seeks reconsideration of a grant of summary judgment, as it did here, we conduct a de novo review. See National Leadburners Health and Welfare Fund v. O.G. Kelley & Co., Inc., 129 F.3d 372, 374 (6th Cir.1996). We now turn to the statutory interpretation issue presented.

1.

The federal appellants argue that s 2719 permits gaming on certain Indian lands acquired in trust after October 17, 1988 only if certain conditions are met, none of which have been met. They contend that s 2719 applies to the gaming at issue based on the plain language of s 2719(a), which provides that s 2719's general prohibition applies to "gaming regulated by this chapter." The federal appellants argue that the district court erred in its reading of the statute by concluding that s 2719 does not apply to Class III gaming authorized by a compact. They disagree with the district court's reading of s 2710(d)(1) as authorizing Class III gaming as long as a valid tribal-state compact authorizes the gaming. The federal appellants contend that, contrary to the district court's assessment, conformance with s 2710 via a valid, approved compact is a necessary but not a sufficient authorization for a tribe's gaming activities and that s 2719 remains applicable to the gaming at issue. The State of Michigan echoes the federal appellants' argument, contending that the plain language of s 2719(b) contains the only exceptions to the operation of s 2719(a)'s general prohibition of gaming on certain lands acquired in trust after October 17, 1988.

The Community argues that by its own terms s 2719 applies only to "gaming regulated by [the IGRA]," see s 2719(a), and that because s 2710(d)(2)(C) provides that "Class III gaming ... shall be fully subject to the terms and conditions of the Tribal-State compact," the compact regulates the gaming at issue. Thus, in the Community's view, s 2719 does not apply to Class III gaming authorized by a tribal-state compact because the compact, and not the IGRA, regulates such gaming. The Community argues that such an interpretation fits with Congress's purposes of promoting Indian gaming and providing states with a role in the regulation of Class III Indian gaming.

Absent an ambiguity or a result at odds with a statute's purposes, we must interpret a statutory provision according to its plain meaning. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); Nixon v. Kent County, 76 F.3d 1381, 1386 (6th Cir.1997). Section 2719(a) provides that except for certain listed exceptions, "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988"

(emphasis added). The Community's reasoning is that s 2719 provides that it only applies to gaming regulated by the IGRA, and the very governance of the compact takes the gaming at issue outside of the IGRA. This interpretation of the statute is undermined by the fact that any gaming subject to a tribal-state compact is necessarily regulated by the IGRA because (1) the compact mechanism is created and governed by the IGRA, see 25 U.S.C. s 2710(d), and (2) provisions of the IGRA other than the compact provisions regulate compact-authorized gaming, see, e.g., 25 U.S.C. s 2712(a) (providing Chairman of National Indian Gaming Commission with approval power over pre-1988 Class III tribal gaming ordinances); 25 U.S.C. s 2713 (providing National Indian Gaming Commission with power to levy civil penalties and to order temporary closure of Indian gaming). As such, it is clear that compact-authorized gaming is regulated by the IGRA. Accordingly, s 2719's general prohibition and the prerequisites to its exceptions (namely, the Interior Secretary's determination, after consultation with local and tribal leaders, that the proposed gaming is in best interest of tribe and would not be detrimental to surrounding community, as well as gubernatorial concurrence, see n.7 supra) apply to Class III gaming authorized by a valid tribal-state compact. See Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa) v. Babbitt, 929 F.Supp. 1165, 1169 (W.D.Wis.1996) ("off-reservation gaming is permitted only if [conditions of s 2719(b)(1)(A) are satisfied]" (emphasis added)); see, e.g., Forest County Potawatomi Community of Wisconsin v. Doyle, 1993 WL 765438, at *3, *5 (W.D.Wis. Sept.16, 1993) (unpublished) (Class III gaming enterprise approved under s 2719 process and a valid, approved tribal-state compact was also reached), aff'd, 45 F.3d 1079 (7th Cir.1995); see also Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa) v. Babbitt, 961 F.Supp. 1276 (W.D.Wis.1997) (considering s 2719 Interior Secretary approval process and accepting notion that s 2719 applies to Class III gaming), reconsidering in part, 929 F.Supp. 1165. A valid, approved compact is a necessary, but not a sufficient, condition for Class III gaming. See 25 U.S.C. s 2710(d)(1) (providing that Class III gaming activities "shall be lawful on Indian lands only if such activities are ... conducted in conformance with a valid Tribal-State compact" (emphasis added)). Just as the Interior Secretary's approval of a Class III gaming proposal does not override the simultaneous compact requirement under s 2710 or the gubernatorial concurrence requirement under s 2719(b)(1)(A), see Pueblo, 104 F.3d 1546; Confederated Tribes, 110 F.3d 688; see also Coeur d'Alene Tribe v. Idaho, 842 F.Supp. 1268 (D.Idaho 1994) (under IGRA, state could not operate gaming on Indian reservation absent tribal ordinance and tribal-state compact), aff'd, 51 F.3d 876 (9th Cir.1995), the existence of a valid, approved compact does not eliminate other statutory

requirements, in this case, conformity with s 2719. To find that the existence of a valid, approved tribal-state compact somehow eliminates other IGRA provisions would obviate the plain language of the statute and its establishment of a federal regulatory regime through statutory standards and the National Indian Gaming Commission. Like s 2719(b)(1)(A)'s requirement that a state's governor concur in the waiver of the general gaming prohibition for a gaming proposal, the compact process simply adds a local governmental component to the regulation of Class III Indian gaming. See Confederated Tribes, 110 F.3d at 695 (characterizing gubernatorial concurrence requirement under s 2719 as prerequisite local approval to s 2719's allowance of off-reservation gaming).

Our reading of s 2719 does not produce a result that is at odds with the IGRA's purposes, and thus we have no reason to turn away from the plain meaning of the statute. The IGRA's articulated purposes are: (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. s 2702; see also Pueblo, 104 F.3d at 1548 (summarizing same legislative purposes). Interpretation of the IGRA in a manner urged by the Community would contradict the IGRA's stated purpose of creating a federal regulatory regime as well as the intent to protect Indian gaming from organized crime. See Pueblo of Santa Ana v. Kelly, 932 F.Supp. 1284, 1292 (D.N.M.1996) (discussing differences between Class II and Class III gaming requirements, tribal-state compact's role as "an additional requirement" for Class III gaming and tribal-state compact's intended function as protection against infiltration of organized crime into high-stakes gambling), aff'd, 104 F.3d 1546 (10th Cir.), cert. denied, — U.S. ——, 118 S.Ct. 45, — L.Ed.2d —— (1997); see also S.Rep. No. 100-446, at 13, reprinted in 1988 U.S.C.C.A.N. at 3083 (discussing compact process and its role in regulation of complex and sophisticated forms of gaming enterprises). Section 2719 concerns a distinct sphere of Indian gaming: off-reservation gaming facilities on land acquired after the IGRA's enactment. The two statutory sections are not an "either-or" proposition. Reading the compact provi-

sions as an opportunity to forego regulation by the IGRA would clearly run afoul of Congress's stated goals and would produce an absurd result.

2.

In considering the meaning of the IGRA provisions at issue, the district court reasoned that it would be "nonsensical" to interpret the statute so that s 2719 applied to the compact-authorized gaming because such a reading would require the Governor of Michigan and the Interior Secretary each to approve twice the gaming at issue. Keweenaw Bay I, 914 F.Supp. at 1502-03. The district court's reasoning on this point is flawed. The Interior Secretary's two sets of approvals are of different natures and the Michigan Governor's endorsement of the compact was required pursuant only to this compact's terms so that, if s 2719 were applicable, he would indeed have two separate opportunities, in this case, to endorse this Class III gaming plan.

The Interior Secretary's involvement is at two levels. He must review every compact for Class III gaming on all Indian lands. 25 U.S.C. s 2710(d)(2)(C) & (d)(8). The Interior Secretary also reviews gaming activities to be conducted on certain non-reservation lands that are acquired by the federal government in trust for tribes after October 17, 1988 and determines if s 2719's general prohibition of Class II and Class III Indian gaming on such lands should be waived. 25 U.S.C. s 2719(b)(1)(A). The Interior Secretary may disapprove a compact only if the compact violates an IGRA provision, any other federal law or the United States' trust obligations to a tribe. 25 U.S.C. s 2710(d)(8)(B). In contrast, the Interior Secretary may determine that s 2719's general prohibition of off-reservation Indian gaming on certain lands will not apply if "after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, [he] determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. s 2719(b)(1)(A). This discretionary waiver is very different from the s 2710 approval of a compact as it involves a "best interests" determination which requires consultation with local and tribal officials and a determination that the proposed gaming would not be detrimental to the surrounding community. In contrast, the Secretary's disapproval of a compact is limited to the aforementioned statutorily specified circumstances. Thus, the two Interior Secretary approvals necessary in this case are clearly of a different nature.

Regarding obtaining the Michigan Governor's "approval" twice, we point out that a governor's endorsement of a compact as required by the terms of a compact is coincidental, varied and dependent on the relevant state's

laws. See, e.g., Pueblo, 104 F.3d at 1559 (deciding that Governor of New Mexico lacked authority, under New Mexico Constitution or state statute, to bind state to tribal-state compacts). Thus, it is not determinative of the meaning of the IGRA's provisions. In addition, the Michigan Governor's endorsement of the compact per the terms of the compact itself is, like the Interior Secretary's two distinct instances of involvement, of a qualitatively different nature from his concurrence in the Interior Secretary's discretionary "best-interests" waiver of s 2719's general gaming prohibition. See Confederated Tribes, 110 F.3d at 695-98, 696 (discussing nature of gubernatorial concurrence in Interior Secretary's determination as "plac[ing] restrictions on the Executive's ability to choose which land is taken into trust for gaming purposes"). In sum, despite the context of state governors' sometimes and varied degrees of involvement in a compact's negotiation, we see no nonsensical result in according s 2719(b) its plain meaning, which explicitly requires the Interior Secretary's best interests determination and a gubernatorial concurrence in that determination.

B. The District Court's Interpretation of the Compact

The appellants alternatively argue that the district court erred in granting the Community summary judgment based on its conclusion that the compact did not provide that s 2719 applied to the gaming at issue. Given our conclusion regarding the applicability of s 2719 to the gaming at issue, we need not consider this alternative argument regarding the district court's interpretation of the compact.

C. Injunction

Finally, the federal appellants request that we instruct the district court to issue an injunction against the Community's gaming activities. Given that the district court did not consider the appellants' request for injunctive relief, we leave the issue for the district court to address in the first instance. See, e.g., McCarthy v. Recordex Service, Inc., 80 F.3d 842, 857 n. 23 (3d Cir.1996); Alaska Wilderness Recreation and Tourism Ass'n v. Morrison, 67 F.3d 723, 732 (9th Cir.1995).

IV. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND to the district court for further proceedings consistent with this opinion.

FN1. In its brief, the Keweenaw Bay Indian Community refers to itself as "the Community" while the appellants and the district court use the term "the Tribe." As the Keweenaw Bay Indian Community terms itself "the Community," we also utilize such.

FN2. Under the compact, "Indian lands" are defined as all lands held by the federal government in trust for the Community, all lands within the Community's reservation and all lands contiguous to the reservation on October 17, 1988. Compact s 2(B)(1), (2) and (3), J.A. 59. According to the IGRA, "Indian lands" means "all lands within the limits of any Indian Reservation; and any lands, title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual, subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. s 2703(4)(A)-(B).

FN3. Under 25 U.S.C. s 2710(d)(2)(B)-(C), the National Indian Gaming Commission's approval, and its publication in the Federal Register, of the Community's gaming ordinance was necessary to make Class III gaming activities authorized by the compact "fully subject to the terms and conditions of the Tribal-State compact." 25 U.S.C. s 2710(d)(2)(C).

FN4. At one time the Community operated a bingo (Class II) facility on the same land under the name "Big Bucks Bingo." See Keweenaw Bay I, 914 F.Supp. at 1499 & n. 6. Because that land was not land contiguous to or within the boundaries of the Community reservation, in separate litigation the issue of whether the land was taken into trust by the U.S. government on or before October 17, 1988 was litigated. See United States v. Keweenaw Bay Indian Community, 1993 WL 818943 (W.D.Mich. Sept.27, 1993) (unpublished). That date is crucial because if land is taken into trust after that date, s 2719's general prohibition of Indian gaming absent fulfillment of certain statutory exceptions applies. The district court in that action concluded that the land had not been taken in trust by that date (October 17, 1988) and was in violation of 25 U.S.C. s 2719(a). It ordered a halt to the (Class II) bingo operations. See id. The Community subsequently docketed an appeal of that order with this court, but then voluntarily dismissed its appeal of that order. On February 4, 1997, United States v. Keweenaw Bay Indian Com-

munity, No. 94-1017, was dismissed pursuant to the Community's Fed. R.App. P. 42 motion.

FN5. At its gaming facility, according to the district court's opinion from February 1996, the Community operates six blackjack tables, one craps table, and electronic and/or video games of chance including approximately 100 video poker games and slot machines. Keweenaw Bay I, 914 F.Supp. at 1499.

FN6. The applicability of 25 U.S.C. s 2710 is not disputed by any party.

FN7. 25 U.S.C. s 2719(b)(1)(A) is as follows. (1) Subsection (a) of this section [the general prohibition of gaming] will not apply when— (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination;

FN8. The federal defendants-appellants appeal both the order granting summary judgment and the denial of their Fed.R.Civ.P. 59(e) motion to reconsider. The State of Michigan appeals the denial of its R. 59(e) motion. All the appeals contend error in the same legal conclusion which was the basis of the granting of summary judgment as well as the denial of the motions to reconsider, namely that s 2719 does not apply to the Class III gaming authorized by the compact. 914 F.Supp. 1496 reconsideration or, in the alternative, to alter or amend judgment (docket # 37) is DENIED.

IT IS FURTHER ORDERED that intervening defendant State of Michigan's motion to alter or amend (docket # 39) is DENIED.

KEWEENAW BAY INDIAN COMMUNITY,
Plaintiff,
v.
UNITED STATES of America, U.S. Department of the Interior,
and U.S. Department
of Justice, Defendants.
No. 2:94-CV-262.
United States District Court,
W.D. Michigan,
Northern Division.
Feb. 5, 1996.

*1497 Joseph P. O'Leary, Keweenaw Bay Indian Community Tribal Center, Baraga, MI, Konrad D. Kohl, Kohn, Harris & Peters, PC, Metamora, MI, for plaintiff.

Edward J. Passarelli, U.S. Department of Justice, Environment & Natural Resources, Division-General Litigation Sec., Washington, D.C., for defendants.

OPINION

McKEAGUE, District Judge.

This case presents the questions of whether the tribal-state compact between Keweenaw Bay Indian Community and the State of Michigan permits class III gaming on a particular tract of land in Marquette County, Michigan, and whether s 2719 of the Indian Gaming Regulatory Act, 25 U.S.C. s 2701 et seq., applies to class III gaming on Indian lands when a tribal-state compact authorizing such gaming exists. Presently before the Court are plaintiff's motion for summary judgment and declaratory and injunctive relief, and defendants' motion for summary judgment and motion to take judicial notice.

I. INDIAN GAMING REGULATORY ACT

The Indian Gaming Regulatory Act ("IGRA") was enacted by Congress in October *1498 of 1988 and provides a comprehensive scheme for regulating gaming activities on Indian lands. 25 U.S.C. ss 2701-2721. According to the legislative history, the purposes of IGRA are to (1) provide a system for joint regulation by tribes and the federal government of class II gaming on Indian lands, and (2) a system of compacts between tribes and states for regulation of class III gaming. S.Rep. No. 100-446, 100th Cong., 2d Sess., reprinted in 1988 U.S.Code Cong. & Admin.News 3071 [hereinaf

ter "U.S.C.C.A.N."]. IGRA divides gaming into three classes, each subject to differing degrees of tribal, state and federal jurisdiction and regulation.

Class I gaming includes social games for nominal prizes or traditional forms of "Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. s 2703(6). When conducted on Indian lands, class I gaming is within the exclusive jurisdiction of the Indian tribe. Id. s 2710(a)(1). Class I gaming "shall not be subject to the provisions of this Act [IGRA]." Id.

Class II gaming includes bingo and related games such as pull tabs, lotto, punch boards and card games such as poker in which the players play against one another rather than against the house. 25 U.S.C. s 2703(7)(A), (B). Class II gaming does not include black jack or any electronic games of chance, slot machines, or any "banking" card games, in which players play against the house and the house acts as a banker. 25 U.S.C. s 2703(7)(B). Tribes may engage in class II gaming if "such Indian gaming is located within a state that permits such gaming for any purpose by any person, organization or entity ..., and the governing board of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman" of the National Indian Gaming Commission. Id. s 2710(b)(1)(A), (B). Such gaming is within the jurisdiction of Indian tribes, but regulated by the provisions of IGRA. Id. s 2710(a)(2).

Class III gaming encompasses all forms of gaming which are not included in either class I or class II. In order for class III gaming to be lawful on Indian lands, the gaming must be "authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman." [FN1] 25 U.S.C. s 2710(d)(1)(A)(i)-(iii). In addition, the activities must be "located in a State that permits such gaming for any purpose by any person, organization, or entity, and ... conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State...." 25 U.S.C. s 2710(d)(1)(B)-(C). Class III gaming is "fully subject to the terms and conditions of the Tribal-State Compact." [FN2] 25 U.S.C. s 2710(d). Neither party disputes the fact that class III gaming is the only type of gaming at issue in this litigation.

FN1. "Chairman" means the Chairman of the National Indian Gaming Commission. 25 U.S.C. s 2703(2).

FN2. IGRA provides that any tribe having jurisdiction over lands upon which they wish to conduct class III gaming shall request the state in which the lands are located to negotiate for the purpose of entering into a

compact governing such gaming. 25 U.S.C. s 2710(d)(3)(A). Upon such request, the state shall negotiate with the Tribe in good faith. Id. In the event that the state refuses to enter into negotiations, the Tribe may bring an action to compel the state to negotiate. 25 U.S.C. s 2710(d)(7)(A)(i). The Tribe cannot bring such an action until 180 days after the Tribe requests the state to enter negotiations. 25 U.S.C. s 2710(d)(7)(B)(i).

II. FACTUAL BACKGROUND

On October 14, 1988, the Keweenaw Bay Indian Community (the "Tribe") obtained title to the parcel of land in Marquette County, Michigan, on which it is conducting the class III gaming at issue in the present case. This land was placed into trust by the Department of the Interior for the benefit of the Tribe on September 24, 1990. [FN3] Under the Constitution of the Tribe, this land became part of the reservation on that same date.

FN3. This date was determined in prior litigation. The applicable date of the trust status of this parcel of land is an issue presently pending at the Sixth Circuit.

***1499** The Tribe previously operated a class II bingo facility in Marquette, Michigan, under the name "Big Bucks Bingo II" on this same parcel of land. An action for declaratory relief and an injunction to close down that class II facility was filed by a United States Attorney. On September 27, 1993, the United States District Court for the Western District of Michigan granted the United States of America declaratory relief, holding that the class II gaming conducted by the Tribe violated 25 U.S.C. s 2719(a). United States of America v. Keweenaw Bay Indian Community, No. 92-CV-265, 1993 U.S.Dist. LEXIS 15664 (W.D.Mich. Sept. 27, 1993). After the Court's ruling, the Tribe ceased operating class II gaming on this parcel of land, and appealed. [FN4]

FN4. The United States Court of Appeals for the Sixth Circuit is holding this appeal in abeyance pending final resolution of the Tribe's application under 25 U.S.C. s 2719.

On August 20, 1993, the Tribe and the State of Michigan entered into a tribal state compact authorizing class III gaming on the Tribe's "Indian lands" within the State of Michigan. [FN5] The compact defines "Indian lands" as:

FN5. According to IGRA, "Indian lands" means "all lands within the limits of any Indian Reservation; and any lands, title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual, subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. s 2703(4)(A)-(B).

(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the Reservation of the Indian Tribe on October 7, 1988; and (3) any lands, title to which is either held in trust by the United States for the benefit of the Tribe or individual, or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercised governmental power. Compact between the Keweenaw Bay Indian Community and the State of Michigan, sec. 2(B) (hereinafter "Compact").

The Tribe then submitted a tribal gaming ordinance to the National Indian Gaming Commission, as required by IGRA. See 25 U.S.C. s 2710(d)(2)(A). The Chairman of the National Indian Gaming Commission approved the ordinance, and the approval was published in the Federal Register on March 3, 1994. Fed.Register, Vol. 59, No. 42, March 3, 1994, pp. 10185-10186.

Prior to opening the class III gaming facility, [FN6] the Tribe sought approval from the Bureau of Indian Affairs. The Bureau of Indian Affairs responded that the land was subject to the requirements of 25 U.S.C. s 2719 which prohibits gaming unless the Tribe meets one of the exceptions provided within. The Tribe opened the class III facility on September 28, 1994, and commenced this lawsuit. At this facility, the Tribe operates six blackjack tables, one craps table, and electronic and/or video games of chance at the casino, including, but not limited to, approximately 100 video poker games and slot machines.

FN6. This class III gaming operation is located in the same facility that closed after the prior litigation concerning class II gaming.

The Tribe claims that a valid tribal-state compact exists which allows class III gaming on the land in question and seeks declaratory and injunctive relief against defendants the United States of America, the United States Department of the Interior, and the United States Department of Justice (collectively "federal defendants"). Specifically, the Tribe seeks a declaratory judgment that the class III gaming activities are lawful and to enjoin the federal defendants from taking action to prohibit the gaming. [FN7]

FN7. Initially, the Tribe also claimed denial of equal protection and selective prosecution, but the Tribe later agreed to dismiss these claims.

The federal defendants claim that IGRA prohibits all gaming on land taken into trust after October 17, 1988, unless an exception contained within is satisfied. The federal defendants claim that the Tribe is conducting class III gaming contrary to the express prohibition of IGRA. The federal defendants further claim entitlement to an injunction prohibiting and abating the gaming.

*1500 Both parties have filed motions for summary judgment, [FN8] and a hearing was conducted on September 5, 1995. The Court has reviewed the parties' respective briefs and considered the arguments offered at the hearing. The Court now considers this matter ripe for determination.

FN8. Defendants have also filed a request for judicial notice. This pleading requests the Court to take judicial notice of the position of Michigan Governor John Engler with respect to off-reservation gaming. The Court declines to do so as it does not consider this information relevant to determination of whether there exists a valid tribal-state compact authorizing class III gaming on the land in question or whether IGRA expressly prohibits the gaming at issue in this litigation. Accordingly, defendants' motion for the Court to take judicial notice is denied.

III. SUMMARY JUDGMENT STANDARD

[1] Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52, 106 S.Ct. at 2512. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-248, 106 S.Ct. at 2510 (emphasis in original).

[2][3] The substantive law determines which facts are material. Id. at 248, 106 S.Ct. at 2510. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

of summary judgment." Id. An issue of material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.

Neither party contends that a genuine issue of material fact exists; thus, summary judgment is appropriate.

IV. THE TRIBAL-STATE COMPACT

[4] The Keweenaw Bay Indian Community has jurisdiction over the tract of land on which the class III gaming is conducted, and the governing body, the Keweenaw Bay Tribal Council, approved a gaming ordinance. There has been no dispute concerning whether the Keweenaw Bay Community's ordinance meets the requirements of 25 U.S.C. s 2710(b). The ordinance was approved by the Chairman of the National Indian Gaming Commission, and the approval was published in the Federal Register on March 3, 1994. Fed.Register, Vol. 59, No. 42, March 3, 1994, pp. 10185-10186. Likewise, the federal defendants do not contest the fact that Michigan is a state which permits gaming by at least some persons, organizations or entities.

By its own terms, the tribal state compact became effective upon the fulfillment of four conditions. Compact, sec. 11(A)-(D). The compact first required endorsement by the tribal chairperson after approval by the tribal council. Tribal Council President Frederick Dakota signed the compact on August 20, 1993. The second requirement was that the governor of the state endorse the compact and seek concurrence in that endorsement by resolution of the Michigan Legislature. Governor John Engler signed this compact on August 20, 1993, and on September 28, 1993. the compact was given the final legislative approval by the Michigan Senate. The final requirements were approval by the Secretary of the Interior of the United States and publication in the Federal Register. On November 30, 1993, the compact was approved by the Secretary of the Interior and published in the Federal Register. Fed.Register, Vol. 58, No. 228, November 30, 1988, p. 63262.

In the "Purpose and Objective" section, the compact lists as a purpose "of the Tribe ***1501** in making this Compact, ... [t]o compact for Class III gaming on Indian lands in Michigan as authorized by IGRA." Compact, sec. 1(C). Section 4 of the compact sets forth the provisions for regulating class III gaming. The compact provides that the Tribe may lawfully conduct a variety of class III games on Indian lands. [FN9] Compact, sec. 3(A). According to the compact, Indian lands include "[a]ny lands title to which is ... held in trust by the United States for the benefit of the Tribe...." Compact, sec. 2(B)(3). The land on which the Tribe is conducting class III gaming was placed into trust for the benefit of the Tribe by the Department of the Interior on September 24, 1990, nearly three years before this compact was signed.

FN9. Among the class III games listed are: craps and related dice games; wheel games including "Big Wheel" and related games; roulette; banking card games; electronic games of chance; and keno. Compact, sec. 3(A)(1)- (6).

Pursuant to the terms of the compact, "Indian lands" also means "all lands currently within the limits of the Tribe's Reservation." Compact, sec. 2(B)(1). The Tribe obtained title to the land on October 14, 1988, and pursuant to the Tribe's Constitution, the land became part of the Tribe's Reservation on September 24, 1990, the date the land was held in trust for the benefit of the Tribe. See Keweenaw Bay Indian Community Constitution, Art. I. [FN10] This parcel of land fits within the definition of "Indian lands" as described in ss 2(B)(1) and (3) of the compact. The compact itself provides that class III gaming on the Tribe's Indian lands is lawful, [FN11] (Compact, sec. 3(A)), but only so long as the compact is in effect. Compact, sec. 12(D). Thus, the compact permits the class III gaming at issue.

FN10. Article I of the Keweenaw Bay Indian Community's Constitution provides: The territorial jurisdiction of this Constitution shall embrace the land within the original boundary lines of the L'Anse Reservation as defined pursuant to treaty dated September 30, 1854, (10 Stat. 1109), and any and all future additions of land acquired within or without said boundary line by the Secretary of the Interior or by the tribe, except as otherwise provided by law.

FN11. The Compact places certain restrictions on class III gaming activities, but there is no allegation that the Tribe is violating any provision of the Compact other than s 2(C), an allegation the Court finds to be without merit.

The federal defendants contend that plaintiff's class III gaming activity violates section 2(C) of the compact which requires the Tribe to submit to the requirements of 25 U.S.C. s 2719. Section 2(C) of the compact provides: "Notwithstanding subsection 2(B) above, any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. s 2719 or any successor provision of the law." The federal defendants' argument neglects the fact that, at the time this compact was signed and approved, the parcel of land on which the class III gaming is conducted was already held in trust for the Tribe. As a result, this parcel of land cannot be "land which the Tribe proposes to be taken into

trust." Compact, sec. 2(C) (emphasis supplied). Thus, the Court finds section 2(C) of the compact inapplicable to the parcel of land on which the Tribe is presently conducting class III gaming.

Accordingly, the Court finds that the tribal-state compact between the Keweenaw Bay Indian Community and the State of Michigan authorizes the class III gaming at issue in the present litigation.

V. APPLICABILITY OF 25 U.S.C. S 2719

The federal defendants contend that the tribal-state compact does not change the fact that 25 U.S.C. s 2719 prohibits the Tribe from engaging in the class III gaming involved in this case because the land was acquired by the Secretary of the Interior in trust for the Tribe after October 17, 1988. Section 2719 provides: Except as provided in subsection (b) of this section, gaming regulated by this Chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October *1502 17, 1988; or (2) the Indian tribe has no reservation on October 17, 1988 ... 25 U.S.C. s 2719(a).

The federal defendants contend that the Tribe is conducting gaming on land acquired in trust after the relevant date, that the Tribe had a reservation as of that date, and that the land on which the class III gaming facility is located was not contiguous to the Tribe's reservation boundaries on October 17, 1988. In addition, defendants claim that the Tribe has not obtained the approval from the Secretary and concurrence from Governor Engler that are required to satisfy the exception provided in 25 U.S.C. s 2719(b). Section 2719(b) provides: (1) Subsection (a) of this section will not apply when—(A) The Secretary, after consultation with the Indian tribe and appropriate state and local officials ... determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. 25 U.S.C. s 2719(b)(1).

[5] The Tribe does not contest the defendants' assertions concerning the parcel of land on which the class III gaming is conducted, nor does it contend that the Tribe's activities fit into one of the exceptions to the provision. Instead, the Tribe contends that a tribal state compact exists, and that the compact is the appropriate vehicle for regulating class III gaming, not 25 U.S.C. s 2719. In short, the Tribe argues that 25 U.S.C. s 2719 is inapplicable to the class III gaming at issue in this litigation. The Court agrees. Section 2719 prohibits gaming activities on land taken into trust after October 17, 1988. 25 U.S.C. s 2719 begins: "Except as provided in [the excep-

tions listed in subsection (b)] ..., gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988...." 25 U.S.C. s 2719(a). The Tribe contends that class III gaming is not "gaming regulated by this chapter." In determining whether class III gaming is regulated by IGRA, the Court will view the statute as a whole. See Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1349 (6th Cir.1994).

25 U.S.C. s 2710(d) addresses the regulation of class III gaming on Indian land. This section provides that class III gaming is lawful if certain conditions are met. As discussed in part IV, the Tribe met these conditions. Once the conditions are satisfied, regulation of class III gaming is "fully subject to the terms and conditions of the Tribal-State Compact." 25 U.S.C. s 2710(d)(2)(C). Thus, the Court concludes that s 2719 is inapplicable in the instant case because the class III gaming is regulated by the Compact between the Keweenaw Bay Indian Community and the State of Michigan rather than by IGRA. [FN12]

FN12. At least one other court has noted that "the tribal-state compact is the exclusive method of regulating class III gaming" State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir.1994).

The Court's conclusion is also supported by the legislative history. One of the dual purposes of IGRA is to set forth a "system of compacts between tribes and states for regulation of class III gaming." 1988 U.S.C.C.A.N. at 3071. IGRA "does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact." 1988 U.S.C.C.A.N. at 3076.

In addition, to adopt the federal defendants' position would result in a non- sensical reading of the statute. Under s 2719, in order for gaming activities to be lawfully conducted on Indian lands, the Secretary of the Interior must approve of the proposed gaming and the state governor must concur in that approval. The Secretary must make a determination that the gaming activity "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. s-2719(b)(1)(A). In this scheme, the federal government has discretion in the "best interest" determination, and the state has no voice in the decision until after the ***1503** Secretary has made a favorable determination.

Yet, the IGRA provisions that specifically pertain to class III gaming permit the federal government much less discretion and allow the state a more significant role. IGRA requires the Chairman to approve of any ordinance or resolution pertaining to class III gaming provided that certain con

ditions are met. 25 U.S.C. s 2710(d)(2)(B). If these conditions are satisfied, the Chairman may not withhold approval. Upon the Chairman's approval and publication of that approval in the Federal Register, the Tribe has a statutory right to bring a cause of action [FN13] against a state the refuses to negotiate a tribal-state compact [FN14] in good faith. [FN15] 25 U.S.C. s 2710(d)(7)(A). Section 2719 affords the Tribe no such protection.

FN13. Tribal-state compacts are required only for class III gaming. 25 U.S.C. s 2710(b). See also United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir.1990).

FN14. An Indian tribe must wait until after the "180-day period beginning on the date on which the Indian Tribe requested the State to enter into negotiations" has lapsed before filing suit. 25 U.S.C. s 2710(d)(7)(B)(i).

FN15. Assuming a state does negotiate and a tribal-state compact is formed, the compact is then forwarded to the Secretary of the Interior for approval. 25 U.S.C. s 2710(d)(3)(B).

In addition, the Tribe has already received approval from both the Secretary of the Interior and Governor Engler. Governor Engler signed the Tribal-State Compact permitting class III gaming on the Tribe's Indian lands on August 20, 1993. As discussed in part IV of the Court's opinion, this compact clearly applies to the land on which the controversial class III gaming is conducted. The Secretary's approval was published in the Federal Register on November 30, 1993. Fed.Register, Vol. 58, No. 228, November 30, 1988, p. 63262. Surely, Congress did not intend that the Tribe should submit to the approval process a second time, merely to get the Secretary's and Governor's approval in reverse order.

Accordingly, the Court finds s 2719 inapplicable to the class III gaming presently at issue.

VI. RELIEF

[6][7] The Tribe seeks declaratory and injunctive relief. The Declaratory Judgment Act states in pertinent part: "[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. s 2201. A declaratory judgment is appropriate where it will clarify and settle the legal relations at issue and provide relief from the uncertainty caused by the controversy which gave rise to the proceeding. Allstate Ins. v. Mercier, 913 F.2d 273, 277 (6th Cir.1990). The Declaratory Judgement Act "is an enabling Act, which confers discretion on the courts rather than an absolute right upon the litigant." Id. (quoting Green v. Mansour,

474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (internal quotation and citation omitted)).

[8] In the Sixth Circuit, five factors are generally considered: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective. Id. (citing E. Borchard, Declaratory Judgments 326 (2d ed.1941)); Allstate Ins. Co. v. Green, 825 F.2d 1061, 1063 (6th Cir.1987); Grand Trunk W. R.R. v. Consolidated Rail Corp., 746 F.2d 323, 325-26 (6th Cir.1984).

[9] In this case, the Tribe seeks a declaratory judgment that the class III gaming activities are lawful, and all of the relevant factors weigh in favor of granting the Tribe the declaratory judgment requested. Declaratory relief would settle the present controversy. Similarly, the declaratory relief ***1504** will help clarify the legal positions of the parties. There is no indication that the Tribe has sought a declaratory relief for the purpose of "procedural fencing," and a declaratory judgment in this action is not likely to encroach upon state court jurisdiction. The Court finds that the issues raised in this case would be served most effectively by a declaratory judgment, and a declaratory judgment will issue.

[10][11] The Tribe also seeks injunctive relief. Specifically, the Tribe asks the Court to issue an order enjoining the federal defendants from taking further action to prohibit the gaming. A prohibitory injunction is a form of equitable relief which requires a showing of irreparable harm and inadequacy of legal remedies. See Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). The Tribe has made neither showing. Accordingly, no injunctive relief will issue.

An order consistent with this opinion shall issue forthwith.

JUDGMENT ORDER

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment (docket # 17) is GRANTED, and DECLARATORY JUDGMENT is entered for the plaintiff.

IT IS FURTHER ORDERED that defendants' motion for summary judgment (docket # 18) is DENIED.

IT IS FURTHER ORDERED that the defendants' motion for the Court to take judicial notice (docket # 29) is DENIED. 940 F.Supp. 1139

KEWEENAW BAY INDIAN COMMUNITY, Plaintiff,

v.

UNITED STATES of America, U.S. Department of the Interior, and U.S. Department of Justice, Defendants.

No. 2:94-CV-262.

United States District Court, W.D. Michigan, Southern Division.

Aug. 27, 1996.

*1140 Joseph P. O'Leary, Baraga, MI, Konrad D. Kohl, Kohl, Harris & Peters, P.C., Metamora, MI, for plaintiff.

Edward J. Passarelli, U.S. Dept. of Justice, Washington, DC, for U.S. defendants.

Keith D. Roberts, Assistant Attorney General, Lottery & Racing Division, Lansing, MI, for State intervenor.

OPINION

McKEAGUE, District Judge.

On February 5, 1996, the Court entered an opinion and order awarding summary judgment and declaratory judgment to the plaintiff. 914 F.Supp. 1496. In essence, the Court's opinion concluded that the class III gaming conducted by the Keweenaw Bay Indian Community (the "Tribe") was authorized by the Tribal-State Compact between the Tribe and the State of Michigan, and therefore lawful. Defendants United States of America, U.S. Department of Interior and U.S. Department of Justice (collectively the "federal defendants") have filed a motion for reconsideration or, in the alternative, to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). The State of Michigan, an intervening defendant, [FN1] has also filed a motion to alter or amend.

FN1. The Court granted the State's motion for intervention on February 28, 1996.

I. RULE 59(E) MOTIONS

[1] Motions to alter or amend are entrusted to the Court's sound discretion. Huff v. Metropolitan Life Ins. Co., 675 F.2d 119, 122 (6th Cir.1982). In general, a judgment *1141 may be altered or amended for one of three reasons: (1) because of an intervening change in the controlling law; [FN2] (2) because evidence not previously available has become available; or (3) necessity to correct a clear error of law or prevent manifest injustice. Javetz v. Bd. of Control, Grand Valley State University, 903 F.Supp. 1181, 1190 (W.D.Mich.1995).

FN2. Neither the parties nor the intervenor have raised the issue of whether the Supreme Court's decision in Seminole Tribe of Florida v. Florida, — U.S. ——, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) has any impact on the Court's decision. The Court notes that it mentioned the Tribe's statutory right under 25 U.S.C. s 2710(d)(7) to bring a cause of action against a state that refuses to negotiate a Tribal-State Compact in good faith at pp. 1502-03 of the opinion issued on February 5, 1996. While the Supreme Court held in Seminole Tribe that Congress lacked the power under the Indian Commerce Clause to abrogate a state's sovereign immunity and struck down 25 U.S.C. s 2710(d)(7), this holding does not impact upon this Court's conclusion that s 2719 is inapplicable to the present case.

[2][3] A Rule 59(e) motion, however, is not intended as a vehicle to relitigate previously considered issues. Keweenaw Bay Indian Community v. State of Michigan, 152 F.R.D. 562, 563 (W.D.Mich.1992), aff'd 11 F.3d 1341 (6th Cir.1993) (citing E.E.O.C. v. Argent Ind., 746 F.Supp. 705, 706 (S.D.Ohio 1989)). In addition, a Rule 59(e) motion should not be utilized to submit evidence which could have been previously submitted in the exercise of reasonable diligence. Id. (citing Weyerhaeuser Corp. v. Koppers Co., 771 F.Supp. 1406, 1419 (D.Md.1991)). Where a moving party attempts to obtain a reversal of a judgment by offering the same arguments previously presented, the "proper vehicle for relief is an appeal" rather than a motion to alter or amend. Id. (citing Dana Corp. v. United States, 764 F.Supp. 482, 489 (N.D.Ohio 1991)).

II. FEDERAL DEFENDANTS' MOTION

The federal defendants' motion requests the Court to reconsider its order and opinion granting plaintiff's motion for summary judgment and granting plaintiff declaratory relief. The arguments raised by the federal defendants in support of their motion are essentially the same arguments which were presented in support of the federal defendants' cross motion for sum

mary judgment. The federal defendants' motion is not based on a change in controlling law and the federal defendants do not assert that any of the operative facts have changed since the issues were submitted to the Court.

The federal defendants nevertheless contend that this motion is proper because the opinion and order should be reconsidered to correct a clear error of law. The federal defendants contend that: (1) the Court erroneously relied on the codified version of s 20 of the Indian Gaming Regulatory Act ("IGRA") rather than the enacted version of the Public Law; (2) resort to legislative history was unnecessary and the legislative history supports the federal defendants' position in any event; (3) the class III gaming conducted by the Tribe is regulated by federal regulatory agencies; and (4) the State of Michigan is an indispensable party to this litigation.

A. Reliance on the Codified Version of s 20 of IGRA

[4] The federal defendants' contend that the Court erred in utilizing the codified version of s 20 of the Indian Gaming Regulatory Act, [FN3] which contains the phrase "gaming regulated by this chapter," rather than "gaming regulated by the Act." Although the federal defendants are correct that the codified and enacted versions of the IGRA contain different wording, this has no effect upon the Court's decision. IGRA, codified as 25 U.S.C. s 2701 et seq., is Chapter 29 of Title 25 of the United States Code; although the Act contains many sections and subsections, it is comprised of only one chapter. As such, in the Court's opinion of February 5, 1996, "chapter" was understood to mean the whole of the Indian Gaming Regulatory Act. [FN4]

FN3. Section 20 of the Indian Gaming Regulatory Act is codified as 25 U.S.C. s 2719.

FN4. The language of the Court's opinion clearly reflects the Court's understanding that "Chapter" meant the Indian Gaming Regulatory Act. See 914 F.Supp. at 1502 ("The Tribe contends that [the] class III gaming [at issue in this litigation] is not 'gaming regulated by this chapter.' In determining whether [the] class III gaming [here at issue] is regulated by IGRA, the Court will view the statute as a whole.").

*1142 The federal defendants then attempt to utilize the irrelevant semantical distinction between "Act" and "chapter" to recapitulate their argument that 25 U.S.C. s 2719 is applicable to the class III gaming at issue in this litigation. The federal defendants misconstrue this Court's opinion as stating that IGRA does not regulate any class III gaming. At no time did this

Court determine that class III gaming is never regulated by IGRA. Certainly, class III gaming is regulated by IGRA because class III gaming is prohibited by IGRA in the absence of a Tribal-State Compact. Once a Tribal-State Compact that meets all the requirements provided in IGRA [FN5] is created, however, class III gaming conducted on the land subject to the Compact is properly regulated by that Compact. The class III gaming at issue is conducted on land subject to a valid Compact between the Tribe and the State of Michigan. Thus, the Court correctly determined that the gaming at issue in this litigation is regulated by the Compact, and the federal defendants' contention that the Court erroneously relied on the codified language rather than the enacted language provides no basis to alter or amend the judgment.

FN5. In the instant litigation, there was no allegation that the Tribe had failed to satisfy any of the steps necessary to create a valid Tribal-State Compact.

B. Whether Resort to Legislative History was Unnecessary

[5] The federal defendants next contend that resort to legislative history was unnecessary because the language of the statute is plain and unambiguous. The federal defendants rely on Supreme Court precedent holding that when the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." [FN6] United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)); accord Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.... When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.' ").

FN6. The federal defendants also contend that if resort to legislative history was necessary, the legislative history supports their position. The federal defendants then point to newly raised legislative history. This legislative history does not address the issue of land already owned by an Indian Tribe at the time a Compact is approved and is of little use.

In this case, the Court's ruling was based upon the plain and unambiguous language of the IGRA. As the Court's opinion noted, 25 U.S.C. s 2710(d) addresses the regulation of class III gaming on Indian lands, and provides that class III gaming is lawful if certain conditions are met. The

Court concluded that all of the conditions were satisfied and that the class III gaming at issue in this case was "fully subject to the terms and conditions of the Tribal-State Compact" as provided in 25 U.S.C. s 2710(d)(2)(C). Because the Compact clearly provided for the class III gaming at issue, the Court found that the gaming was lawful and that the gaming was no longer regulated by the IGRA within the meaning employed by s 2719. The Court did not rely on legislative history to reach this conclusion. Instead, the Court relied on the plain language of the statute to reach its conclusion and merely noted that the Court's interpretation was also supported by the legislative history. [FN7] See 914 F.Supp. at 1502-03. Accordingly, the federal defendants' contention that resort to legislative history was unnecessary provides no basis to alter or amend the judgment.

FN7. Both parties cited to the legislative history in their briefs. The Court's brief discussion of the statute's legislative history was appropriate inasmuch as the legislative history had been reviewed because it was raised by the parties and because the Court ascertained that the legislative history was consistent with the plain and unambiguous language of the statute.

C. Regulatory Agencies' Oversight of Class III Gaming

The federal defendants' argument that the powers of the National Indian Gaming Commission ("*1143 NIGC") and the Chairman of the NIGC extend to class III gaming such that the class III gaming at issue in this litigation is subject to the provisions of 25 U.S.C. s 2719 has already been considered and rejected by the Court. Thus, the appropriate forum for reasserting this argument is on appeal rather than in a motion for reconsideration.

D. The State of Michigan as an Indispensable Party

The federal defendants' final argument is that the Court's construction of the Tribal-State Compact between the Tribe and the State of Michigan implicates the rights of an indispensable party, the State of Michigan. The question of whether the Compact permits class III gaming on the land on which the Tribe currently conducts such gaming was an issue in this case from its inception. Since the filing of its complaint, the Tribe sought relief declaring their gaming activities lawful on the basis of the terms of the Compact. The federal defendants clearly knew that the language of the Compact was at issue in this litigation. In fact, the Tribe and the federal defendants addressed the language of the Compact at the hearing on the cross-motions for summary judgment, and the Court engaged in lengthy discourse with counsel on this issue during that hearing.

If the Court's consideration of the Compact language renders the State an indispensable party, presumably the federal defendants would have sought to require the plaintiff to add the State at an earlier stage in the litigation. The federal defendants elected, however, to wait for a decision, and now seek to claim that the State is essential after receiving a construction of the Compact with which they disagree. The State, on the other hand, admits that it was aware of the pendency of this litigation, and in fact has received and retained 5% of the revenues from the gaming here at issue. If the State truly believed their proffered interpretation of the Compact, presumably it would have moved to intervene prior to entry of judgment. In any event, the Court has already granted the State's motion for intervention, and this issue is now moot.

III. INTERVENING DEFENDANTS' MOTION

The intervening defendant's motion also requests the Court to reconsider its opinion and order granting plaintiff's motion for summary judgment and granting plaintiff declaratory relief. Some of the arguments raised by the intervening defendant have already been addressed and rejected by this Court. Like the federal defendants' motion, the intervening defendant's motion does not purport to be based upon any change in controlling law or operative facts.

A. Whether IGRA Regulates Indian Gaming

[6] The intervenor's brief in support of its motion begins with a three-page overview of the differing classes of Indian gaming and the differing levels of regulation applicable to each class. Nothing contained in this background material differs greatly from the framework discussed in the Court's opinion. The intervenor then argues that the Sixth Circuit has held that the IGRA regulates gaming by Indian Tribes. In Sault Ste. Marie Tribe v. State of Michigan, 5 F.3d 147, 148 (6th Cir.1993), the case cited by the intervenor, the Sixth Circuit did not hold that IGRA regulates Indian gaming. Instead, the Sixth Circuit discussed IGRA's framework and then held that it lacked jurisdiction over the Indian Tribes' appeal from the district court order dismissing the State as a defendant and that an order granting a state sovereign immunity under the Eleventh Amendment was not an appealable collateral order. Id. at 149-150. In any event, this Court does not quarrel with the intervenor's contention that IGRA regulates Indian gaming. Indeed, this Court's ruling was not that IGRA does not regulate Indian gaming, but rather that under the facts of this case, where all the statutory conditions are met and a valid Tribal-State Compact permitting the class III gaming exists, such gaming is lawful. Thus, the intervenor's argument that IGRA regulates Indian gaming provides no basis for the Court to alter or amend the judgment.

*1144 B. IGRA Conditions for Class III Gaming

The intervenor next argues that the IGRA regulatory system requires that three separate conditions must be met before class III gaming may occur such that all class III gaming is regulated by IGRA and 25 U.S.C. s 2719 is always applicable. The Court fully addressed the requirements in s 2710(d) in its opinion, and the intervenor's argument is in this respect, merely tautological. The intervenor also points to other provisions in IGRA which provide the Chairman of the National Indian Gaming Commission with the power to approve management contracts and tribal ordinances or resolutions, but none of these provisions address the lawfulness of the class III gaming conducted by the Tribe. Accordingly, this argument provides no basis for the Court to alter or amend the judgment.

C. Bureau of Indian Affairs' Interpretation of s 2719

The intervenor then argues that the Court should defer to the interpretation of s 2719 by the Bureau of Indian Affairs. The Bureau of Indian Affairs' position is that s 2719 applies to all class III gaming on Indian lands acquired after October 1988, regardless of whether a Tribe enters into a valid Tribal-State Compact permitting class III gaming on particular tracts of land. The Court rejected that interpretation as nonsensical in its opinion and need not consider this same argument on a Rule 59 motion. In addition, the Court notes that the Tribe submitted an application under s 2719 in 1994. [FN8] Two years later, the s 2719 application has still not been processed. The federal defendants offer no explanation as to why, if s 2719 is applicable to the gaming at issue in this litigation, the plaintiff's s 2719 application has not been processed. Because the Court finds the Bureau of Indian Affairs' interpretation of s 2719 nonsensical, the Court need not defer to its interpretation.

FN8. Upon tender of that application, the Tribe's appeal of the ruling in United States v. Keweenaw Bay Indian Community, which determined the date the parcel of land was held in trust, was held in abeyance by the Sixth Circuit Court of Appeals.

D. Meaning of the Compact

[7] Lastly, the intervenor contends that both parties to the Tribal-State Compact intended [FN9] and understood that s 2719 would apply to class III gaming. The intervenor contends that the Tribe has effectively secured a judicial modification of the agreement reached between plaintiff and the State of Michigan upon which the Tribal-State Compact was based, and that the intention of both parties was that s 2719 would be fully operative to any lands acquired in trust for purposes of a gaming establishment after

October 17, 1988. [FN10] As mentioned earlier, the Tribe contended from the onset that s 2719 was inapplicable to its class III gaming because of the Tribal- State Compact. The State was aware of this litigation, but chose to acquiesce in the litigation while continuing to receive revenues from the gaming it now contends is unlawful. The State's actions for the 14 months [FN11] between the date the complaint was filed and the date the *1145 State sought to intervene belie what they now claim the Compact means.

FN9. In support of its intent of the parties argument, the State relies on the affidavit of Michael Gadola, Deputy Legal Counsel to Governor Engler at the time the Compact was signed. The affidavit speaks only to the affiant's own understanding of the Compact and IGRA, and suggests that the Governor's understanding was the same. No affidavit of Governor Engler, however, has been filed. In addition, the Compact was also approved by the Michigan Legislature, but no evidence of legislative intent has been provided by the intervening defendant to the Court. The affidavit of a single staff person, which represents his own understanding of the Compact and the IGRA, is irrelevant to the intent of either Governor Engler or the Michigan Legislature as a body.

FN10. As an initial matter, the Court notes that the intervenor's interpretation of s 2719 as operative only as to "any lands acquired in trust for a gaming establishment" is substantially more narrow than the actual language of s 2719, which provides that "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for an Indian tribe after October 17, 1988 unless...." 25 U.S.C. s 2719(a).

FN11. The complaint was filed on September 26, 1994, but the State did not file its motion for intervention until February 20, 1995, more than two weeks after entry of judgment.

In its opinion, the Court implicitly found that the terms of the Compact were clear and unambiguous such that resort to the intention of the parties was unnecessary. The Compact plainly provides that gaming may be conducted on Indian lands, which are specifically defined in the Compact as including "all lands currently within the limits of the Tribe's Reservation." Compact, s 2(B)(1). As the Court's opinion notes, "the land [on which the gaming at issue in this litigation is conducted] became part of the Tribe's Reservation on September 24, 1990, the date the land was held in trust for the benefit of the Tribe." 914 F.Supp. at 1501. Thus, the parcel of land is clearly and unequivocally within the definition of Indian lands in s 2(B)(1) of the

Compact. In addition, Indian lands include "[a]ny lands the title to which is ... held in trust by the United States for the benefit of the Tribe ..." Compact, s 2(B)(3). As the Court's opinion states, the "land on which the Tribe is conducting class III gaming was placed into trust for the benefit of the Tribe by the Department of the Interior on September 24, 1990, nearly three years before this Compact was signed," 914 F.Supp. at 1501, and this land falls within the definition of Indian lands provided in section 2(B)(3) of the Compact.

The intervenor contends that s 2(C) of the Compact was added [FN12] to ensure that nothing in s 2(B) of the Compact was intended to diminish the State's authority under 25 U.S.C. s 2719. [FN13] The language of s 2(C), however, does not support the intervenor's argument. Section 2(C) provides: "notwithstanding subsection 2(B) above, any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. s 2719 or any successor provisions of the law." Compact, s 2(C) (emphasis added). This provision is not applicable to the parcel of land on which the Tribe is conducting class III gaming because the land is not land which "the Tribe proposes to be taken into trust;" the land was already part of the Reservation at the time of the Compact. The position set forth by the intervenor is contrary to the plain language of the Compact, which clearly permits the class III gaming at issue in this litigation.

FN12. The inclusion of s 2(C) into the Compact corroborates and confirms the Court's construction of IGRA. As a matter of statutory construction, s 2719 does not apply to gaming on Indian land covered by a Compact. As a matter of contract, there is no reason why the Tribe and the State could not agree that the Tribe would also be required to follow s 2719 to lawfully conduct class III gaming on land acquired after the Compact. Such agreement is logical—the State knew what land the Tribe owned and whether gaming on such lands was a good idea. Obviously, neither the State nor anyone else knew, however, whether class III gaming would be a good idea on land later acquired.

FN13. If s 2719 means what the State now claims, there was no reason to include the language of s 2(C) referring to land acquired after the Compact was signed into the Compact.

Accordingly, the intervenor's arguments with respect to the State's intent in entering into the Compact provide no basis to alter or amend the judgment.

IV. CONCLUSION

The Keweenaw Bay Indian Tribe and the State of Michigan entered into a valid Tribal-State Compact on August 20, 1993. The Compact subsequently received the approval of the Michigan legislature and the Secretary of the Interior. The Tribal-State Compact clearly and unequivocally states that class III gaming may be conducted on all land part of the tribe's reservation at the time of the Compact. The land on which the Tribe currently conducts class III gaming was part of the Tribe's reservation at the time of the Compact. The State of Michigan knew, or should have known that this specific tract of land was part of the Tribe's reservation. United States v. Keweenaw Bay Indian Community, No. 2:92-CV-265 (W.D.Mich.), [FN14] ***1146** filed on December 23, 1992, involved Indian gaming on this specific tract of land, and received widespread publicity. In addition, the parties added a section in the Compact to make it clear that s 2719 applies to all land acquired by the Tribe subsequent to the signing of the Compact. The State now says that it did not really mean what is unambiguously set forth in the Compact and claims that the Tribe cannot do what is clearly permitted by the Compact. This it cannot do.

FN14. 1993 WL 818943, 1993 U.S.Dist. LEXIS 15664 (W.D.Mich.1993). This case was appealed to the Sixth Circuit Court of Appeals, but has been held in abeyance pending resolution of the s 2719 application filed by the Tribe. The central issue in that case is the date the particular tract of land on which the Tribe currently conducts class III gaming was taken into trust. No matter which party prevails on appeal, under all alternative dates involved in that litigation, the land was taken into trust and became part of the Tribe's Reservation well before the date of the Compact.

Finding no basis to alter or amend the judgment in either the federal defendants' motion or the motion filed by the intervenor, the Court now DENIES both motions.

An order consistent with this opinion shall issue forthwith.

ORDER DENYING MOTIONS TO ALTER OR AMEND JUDGMENT

In accordance with the Court's written opinion of even date,

IT IS HEREBY ORDERED that defendants United States of America, U.S. Department of the Interior and U.S. Department of Justice's motion for reconsideration or, in the alternative, to alter or amend judgment (docket # 37) is DENIED.

IT IS FURTHER ORDERED that intervening defendant State of Michigan's motion to alter or amend (docket # 39) is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos: 96-2204

KEWEENAW BAY INDIAN COMMUNITY,
Plaintiff - Appellee.
v.

FILED
Apr 01, 1998
Leonard Green, Clerk

UNITED STATES OF AMERICA: U.S. DEPARTMENT OF INTERIOR; U.S. DEPARTMENT OF JUSTICE; BUREAU OF INDIAN AFFAIRS
Defendants - Appellants (96-2410).

STATE OF MICHIGAN
Intervenor- Appellant

Before: Ryan, Siler, and Cole, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellee,

It is ORDERED that the petition for rehearing be, and it hereby, is DENIED.

ENTERED BY ORDER OF THE COURT
__/S/____
Leonard Green, Clerk

A True Copy.
Attest:

__/S/___ (Betty Manning)
Deputy Clerk

Issued as Mandate: April 6, 1998
COSTS: NONE
Filing Fee $
Printing $
Total $

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEWEENAW BAY INDIAN COMMUNITY
Plaintiff,
v.

UNITED STATES OF AMERICA:
U.S. DEPARTMENT OF INTERIOR;
and U.S. DEPARTMENT OF JUSTICE
Defendants .

FILED (L)
96 Aug 27 PM 3:59
Ronald C. Weston, Sr. Clerk
U.S. District Court
Western District of Mich
Passanelli, E.

FILE
Case No. 2:94-CV-262
HON. DAVID W.
McKEAGUE

ORDER DENYING MOTIONS TO ALTER OR AMEND JUDGEMENT

In accordance with the Court's written opinion of even date,

IT IS HEREBY ORDERED that defendants United States of America, U.S. Department of the Interior and U.S. Department of Justice's motion for reconsideration or, in the alternative, to alter or amend judgment (docket #37) is DENIED.

IT IS FURTHER ORDERED that intervening defendant State of Michigan's motion to alter or amend (docket #39) is DENIED.

Dated: August 27, 1996

__/S/___

David W. McKeague
UNITED STATES DISTRICT JUDGE

90-2-4-1732

Department of Justice
General Litigation
Section
96 Aug 29 PM 2:30

§ 2710. Tribal gaming ordinances

(a) Exclusive jurisdiction of Class I gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if-

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person,
organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for
the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph

(2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used
only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an
appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection
provided under this subparagraph may not be transferred to any person

or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less
than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section may
petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all
revenues;

(ii) has resulted in a reputation for safe, fair, and honest
operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2),
(3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsec. (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having
jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly
influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall
publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take

fect on the date of such publication.

(iii) Notwithstanding any provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such
amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts
comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling
devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to
enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct
taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period
described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact
selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph
(A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

A COMPACT BETWEEN THE KEWEENAW BAY INDIAN COMMUNITY AND THE STATE OF MICHIGAN PROVIDING FOR THE CONDUCT OF TRIBAL CLASS III GAMING BY THE KEWEENAW BAY INDIAN COMMUNITY

THIS COMPACT is made and entered into this 20th day of August, 1993, by and between the KEWEENAW BAY INDIAN COMMUNITY (hereinafter referred to as "Tribe") and the STATE OF MICHIGAN (hereinafter referred to as "State").

RECITALS

WHEREAS, the State of Michigan is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of January 26, ch. 6, 1837, 5 Stat. 144 and is authorized by its constitution to enter into contracts and agreements, including this agreement with the Tribe; and

WHEREAS, the Tribe is a federally recognized Indian Tribe (reorganized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 25 U.S.C § 476) and its governing body, the Tribal Council, is authorized by the tribal constitution to enter into contracts and agreements of every description, including this agreement with the State; and

WHEREAS, the Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988 (25 U.S.C. § 2701 et seq.) (hereinafter "IGRA"), which permits Indian tribes to operate Class III gaming activities on Indian reservations pursuant to a tribal-state compact entered into for that purpose; and

WHEREAS, the Tribe presently operates gaming establishments on Indian lands in the State of Michigan, and by Tribal Council Resolution and Tribal Ordinance has adopted rules and regulations governing the games played and related activities at said establishments; and

WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including casino style charitable gaming such as craps, roulette, and banking card games, as well as a lottery operating instant scratch games, and "pick number" games, most of which would be Class III games if conducted by the Tribe; and

WHEREAS, the Michigan Supreme Court in Automatic Music & Vending Corp., v. Liquor Control Comm., 426 Mich. 452, 396 N.W. 2d 204 (1986), appeal dismissed, 481 U.S. 1009 (1987), and the Michigan Court of Appeals in Primages Int'l of Michigan v. Michigan, No. 136017, slip op., 1993 WL 99733 (Mich. Ap. Apr. 6 1993), appeal denied, No. 96368 (Mich. May 25, 1993), have held that the statutory exception found at MCL 750.303(2) allows for the play of electronic gaming devices, which includes computerized or electronic games of chance, albeit subject to specified restrictions regarding the mode of play; and

WHEREAS, said casino style table games and electronic gaming devices are, therefore, permitted "for any purpose by any person, organization or entity," within the meaning of IGRA, 25 U.S.C. § 2710(d)(1)(B); and

WHEREAS, a compact between the Tribe and the State for the conduct of Class III gaming satisfies the prerequisite, imposed by the United States Congress by enactment of IGRA, for the operation of lawful Class III gaming by the Tribe on Indian lands in Michigan; and

WHEREAS, the State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the Tribe and the State agree as follows:

SECTION 1. Purpose and Objectives

The purpose and objectives of the Tribe and State in making this Compact are as follows:

(A) To evidence the good will and cooperative spirit between the State and the Tribe;

(B) To continue the development of effective working relationships between the State and tribal governments;

(C) To compact for Class III gaming on Indian lands of the Tribe in Michigan as authorized by IGRA;

(D) To fulfill the purpose and intent of IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency and strong tribal government;

(E) To provide tribal revenues to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members and for other purposes allowed under IGRA;

(F) To provide for the operation of Class III gaming in which, except as provided in 25 U.S.C §§ 2710(b)(4) and (d)(2)(A) of IGRA, the Tribe shall have the sole proprietary interest and be the primary beneficiary of the Tribe's gaming enterprise;

(G) To recognize the State's interest in the establishment by the Tribe of rules for the regulation of Class III gaming operated by the Tribe on Indian lands;

(H) To recognize the State's interest in the establishment by the Tribe of rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by the owners, operators, and employees and by the patrons of any Class III gaming enterprise of the Tribe; and

(I) To establish procedures to notify the patrons of the Tribe's Class III gaming establishment(s) that the establishment(s) are not regulated by the State of Michigan and that patrons must look to the tribal government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment(s).

SECTION 2. Definitions.

For purposes of this Compact, the following definitions pertain:

(A) "Class III gaming" means all forms of gaming authorized by this Compact, which are neither Class I nor Class II gaming, as such terms are defined in §§ 2703(6) and (7) of IGRA. Only those Class III games authorized by this Compact may be played by the Tribe.

(B) "Indian lands" means:

(1) all lands currently within the limits of the Tribe's Reservation;

(2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and

(3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

(C) Notwithstanding subsection 2(B) above, any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. § 2719 or any successor provision of law.

(D) "Tribal Chairperson" means the duly elected Chairperson of the Board of Directors or Tribal Council of the Tribe.

SECTION 3. Authorized Class III Games

(A) The Tribe may lawfully conduct the following Class III games on Indian lands;

(1) Craps and related dice games;

(2) Wheel games, including "Big Wheel" and related games;

(3) Roulette;

(4) Banking card games that are not otherwise treated as Class II gaming in Michigan pursuant to 25 U.S.C. § 2703(7)(C), and non-banking card games played by any Michigan tribe on or before May 1, 1988;

(5) Electronic games of chance featuring coin drop and payout as well as printed tabulations, whereby the software of the device predetermines the presence or lack of a winning combination and payout. Electronic games of chance are defined as a microprocessor-controlled electronic device which allows a player to play games of chance, which may be affected by an element of skill, activated by the insertion of a coin or currency, or by the use of a credit, and awards game credits, cash, tokens, or replays, or a written statement of the player's accumulated credits, which written statements are redeemable for cash; and

(6) Keno.

This Compact shall apply to card games that are considered to be Class II games pursuant to 25 U.S.C § 2703(7)(C) only if those games are expanded beyond their "nature and scope" as it existed before May 1, 1988, and only to the extent of such expansion. The term "nature and scope" shall be interpreted consistent with IGRA, the legislative history if IGRA, any applicable decisions of the courts of the United States and any applicable regulations of the National Indian Gaming Commission.

Any limitations on the number of games operated or played, their location within Indian lands as defined under this Compact, hours or period of operation, limits on wagers or pot size, or other such limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact.

(B) Additional Class III games may be lawfully conducted by mutual agreement of the Tribe and the State as follows:

(1) The Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State. The request shall identify the additional proposed gaming activities with specificity and any proposed amendments to the Tribe's regulatory ordinance.

(2) The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt. The Governor's action shall be based on:

(a) Whether the proposed gaming activities are permitted in the State of Michigan for any purpose by any person, organization or entity; and

(b) Whether the provisions of this Compact are adequate to fulfill the policies and purposes set forth in the IGRA with respect to such additional games.

SECTION 4 Regulation of Class III Gaming.

(A) The Tribe has enacted a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. This Section 4 is intended to supplement, rather than conflict with the provisions of

the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance, as now or hereafter amended, this Compact shall control.

(B) The regulatory requirements of this Section 4 shall apply to the conduct of all Class III gaming authorized by the Compact. At all times in which it conducts any Class III gaming under this Compact, the Tribe shall maintain, as part of its lawfully enacted ordinances, requirements at least as restrictive as those set forth herein.

(C) The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe.

(D) The Tribe may not license, hire, or employ as a key employee or primary management official as those terms are defined at 25 CFR 502.19, in connection with Class III gaming, any person who:

(1) Is under the age of 18; or

(2) Has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation; or

(3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) within the immediately preceding five years; this provision shall not apply if that person has been pardoned by the Governor of the State where the conviction occurred or, if a tribal member, has been determined by the Tribe to be a person who is not likely again to engage in any offensive or criminal course of conduct and the public good does not require that the applicant be denied a license as a key employee or primary management official; or

(4) Is determined by the Tribe to have participated in organized crime or unlawful gambling or whose prior activities, criminal record, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or to the carrying on of the business and financial arrangements incidental to the conduct of gaming.

(E) All management contracts entered into by the Tribe regarding its gaming enterprise operated pursuant to this Compact shall conform to all the requirements of IGRA, including 25 U.S.C § 2711, and tribal law. If the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be given 14 days prior written notice of such contract.

(F) All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary records. The Tribe shall maintain the following records for not less than three (3) years:

(1) Revenues, expenses, assets, liabilities and equity for each location at which Class III gaming is conducted;

(2) Daily cash transactions for each Class III game at each location at which gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(3) All markers, IOU's, returned checks, hold checks or other similar credit instruments;

(4) Individual and statistical game records (except card games) to reflect statistical drop and statistical win; for electronic, computer, or other technologically assisted games, analytic reports which show the total amount of cash wagered and the total amount of prizes won;

(5) Contracts, correspondence and other transaction documents relating to all vendors and contractors;

(6) Records of all tribal gaming enforcement activities;

(7) Audits prepared by or on behalf of the Tribe; and

(8) Personnel information on all Class III gaming employees or agents, including rotation sheets, hours worked, employee profiles and background checks.

(G) No person under the age of 18 may participate in any Class III game.

(H) The Tribe shall not conduct any Class III gaming outside of Indian lands.

(I) The rules of each Class III card game shall be posted in a prominent place in each card room and must designate:

(1) The maximum rake-off percentage, time buy-in or other fee charged;

(2) The number or raises allowed;

(3) The monetary limit of each raise;

(4) The amount of ante; and

(5) Other rules as may be necessary.

(J) Upon written request by the State, the Tribe will provide information on all consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), management personnel, suppliers and employees sufficient to allow the State to conduct its own background investigation as it may deem necessary and to make an independent determination as to suitability of these individuals, consistent with the standards set for the § 4(D) herein.

(K) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

(1) The Tribe shall have responsibility to administer and enforce the regulatory requirements.

(2) A representative authorized in writing by the Governor of the State shall have the right to inspect all tribal Class III gaming facilities and all tribal records related to Class III gaming, including those records set forth in § 4(F) herein, subject to the following conditions:

(a) With respect to public areas, at any time without prior notice;

(b) With respect to private areas not accessible to the public, at any time during normal business hours, with 12 hours prior written notice; and

(c) With respect to inspection and copying of all tribal records relating to Class III gaming, with 48 hours prior written notice, not including weekends.

(3) Except as otherwise provided by law or as also allowed by the exceptions defined below, the State agrees to maintain in confidence and never to disclose to any third party any financial information, proprietary ideas, plans, methods, data, development, inventions or other proprietary information regarding the gambling enterprise of the Tribe, games conducted by the Tribe, or the operation thereof which is provided to the State by the Tribe without the prior written approval of a duly authorized representative of the Tribe, provided that the information is marked as confidential information when received by the State. Nothing contained in this § 4(K)(3) shall be construed to prohibit:

(a) The furnishing of any information to a law enforcement or regulatory agency of the United States government;

(b) The State from making known the names of persons, firms or corporations conducting Class III gaming activities pursuant to the terms of this Compact, locations at which such activities are conducted or the dates on which such activities are conducted;

(c) Publishing the terms of this Compact;

(d) Disclosing information as necessary to audit, investigate, prosecute, or arbitrate violations of this Compact or other applicable laws or to defend suits against the State;

(e) Complying with any law, subpoena or court order.

(4) The Tribe shall have the right to inspect State records concerning all Class III gaming conducted by the Tribe consistent with Michigan's Freedom of Information Act.

(5) The Tribe shall reimburse the State for the actual costs the State incurs in carrying out any functions authorized by the terms of this Compact, in an amount not to exceed twenty-five thousand dollars ($25,000.00) per annum. All calculations of amounts due shall be based upon fiscal year beginning October 1, and ending September 30, unless the parties select a different fiscal year. Payments due the State shall be made no later than sixty (60) days after the beginning of each fiscal year. Payments due the

State during any partial fiscal year this Compact is in effect shall be adjusted to reflect only that portion of the fiscal year. Within sixty (60) days after each fiscal year in which this Compact is in effect, the State shall submit to the Tribe an accounting of actual costs incurred in carrying out any functions authorized by the terms of this Compact. Any amount of said twenty-five thousand dollars ($25,000.00) not expended by the State on said actual costs shall be returned to the Tribe by the State within sixty (60) days after the fiscal year or treated as a pre-payment of the Tribe's obligation during the subsequent fiscal year.

(6) In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of the Compact.

(L) The Tribe shall comply with all applicable provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C §§ 5311-5314.

SECTION 5. Employee Benefits.

The Tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this Compact, such benefits to which the employee would be entitled by virtue of Michigan Public Act No. 1 of 1936, as amended (being MCL 421.1 et seq.), and Michigan Public Act no. 317 of 1969, as amended (being MCL 481.101 et seq.) if his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts.

SECTION 6. Providers of Class III Gaming Equipment or Supplies

(A) No Class III games of chance, gaming equipment or supplies may be purchased, leased or otherwise acquired by the Tribe unless the Class III equipment or supplies meet the technical equipment standards of either the State of Nevada or the State of New Jersey.

(B) Prior to entering into any lease or purchase agreement, the Tribe shall obtain sufficient information and identification from the proposed seller or lessor and all persons holding any direct or indirect financial interest in the lessor or the lease/purchase agreement to permit the Tribe to conduct a background check on those persons. The Tribe shall not enter into any lease or purchase agreement for Class III gaming equipment or supplies with any

person or entity if the lessor, seller, or any manager or person holding direct or indirect financial interest in the lessor/seller or the proposed lease/purchase agreement is determined to have participated in or have involvement with organized crime or has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation, or has been convicted of or entered a plea of guilty or no context to any other felony offense within the immediately preceding five years, unless that person has been pardoned.

(C) The seller, lessor, manufacturer, or distributor shall provide, assemble and install all Class III games of chance, gaming equipment, and supplies in a manner approved and licensed by the Tribe.

SECTION 7. Dispute Resolution

(A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

(1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the Ameri-

can Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

(B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Notice To Patrons

In each facility of the Tribe where Class III gaming is conducted the Tribe shall post in a prominent position a Notice to Patrons at least two (2) feet by three (3) feet in dimension with the following language:

NOTICE

THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING; THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE KEWEENAW BAY INDIAN COMMUNITY.

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

SECTION 9. Off-Reservation Gaming

An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence or a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

SECTION 10. Regulation of the Sale of Alcoholic Beverages.

(A) The Tribe hereby adopts and applies to its tribal Class III gaming establishment as tribal law those State laws, as amended, relating to the sale and regulation of alcoholic beverages encompassing the following areas: sale to a minor; sale to a visibly intoxicated individual; sale of adulterated or misbranded liquor; hours of operation; and similar substantive provisions. Said tribal laws, which are defined by reference to the substantive areas of State laws referred to above, shall apply to the tribal Class III gaming establishment in the same manner and to the same extent as such laws apply elsewhere in the State to off-reservation transactions.

(B) The Tribe, for resale at its Class III gaming establishment, shall purchase spirits from the Michigan Liquor Control Commission, and beer and wine from distributors licensed by the Michigan Liquor Control Commission, at the same price and on the same basis that such beverages are purchased by Class C licensees.

SECTION 11. Effective Date.

This Compact shall be effective immediately upon:

(A) Endorsement by the tribal Chairperson after approval by the Tribal Council;

(B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register.

SECTION 12. Binding Effect, Duration, and Severability.

(A) This Compact shall be binding upon the State and the Tribe for a term of twenty (20) years from the date it becomes effective unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact.

(C) In the event that either party gives written notice to the other of its right to renegotiate this Compact pursuant to subsection (B), the Tribe may, pursuant to the procedures of IGRA, request the State to enter into negotiations for a successor compact governing the conduct of Class III gaming activities. If the parties are unable to conclude a successor compact, this Compact shall remain in full force and effect pending exhaustion of the administrative and judicial remedies set forth in IGRA an/or any other applicable federal law.

(D) The Tribe may operate Class III gaming only while this Compact or any renegotiated compact is in effect.

(E) In the event that any section or provision of this Compact is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect.

SECTION 13. Notice to Parties

Unless otherwise indicated, all notices, payments, requests, reports, information or demand which any party hereto may desire or may be required to give to the other party hereto, shall be in writing and shall be personally delivered or sent by first-class, certified or registered United States Mail, postage prepaid, return receipt requested, and sent to the other party at its address appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given as aforesaid:

Notice to the Tribe shall be sent to:

Chairperson
Keweenaw Bay Tribal Center
Route 1
Baraga, MI 49908

Notice to the State shall be sent to:

Governor's Office
State of Michigan
P.O. Box 30013
Lansing, MI 48909

Office of Attorney General
Treasury Building
First Floor
Lansing, MI 48922

Every notice, payment, request, report, information or demand so given shall be deemed effective upon receipt, or if mailed, upon receipt or the expiration of the third day following the day of mailing, whichever occurs first, except that any notice of change of address shall be effective only upon receipt by the party to whom said notice is addressed.

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact nor any provision herein may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the Tribe and the State.

SECTION 15. Filing of Compact with Secretary of State.

Upon the effective date of this Compact, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan State Legislature and the Michigan Attorney General. Any subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State.

IN WITNESS WHEREOF, the Tribal Chairperson acting for the Keweenaw Bay Indian Community and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Dated 8/20/93
KEWEENAW BAY INDIAN COMMUNITY

Dated August 20, 1993
STATE OF MICHIGAN

By __/S/__
Frederick Dakota, Chairperson

By __/S/__
John Engler, Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Keweenaw Bay Indian Community and the State of Michigan is hereby approved this 19th day of November, 1993, pursuant to authority conferred on me by Section 11 of the Indian Gaming Regulatory Act, 102 Stat. 2472. I direct that it be promptly submitted to the Federal Register for publication.

__/S/__
Ada E. Deer
Assistant Secretary - Indian Affairs

Supreme Court, U.S.
FILED
SEP 8 1998
OFFICE OF THE CLERK

No. 98-50

In the Supreme Court of the United States

OCTOBER TERM 1998

KEWEENAW BAY INDIAN COMMUNITY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a Tribe must satisfy the requirements in Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, before conducting Class III gaming pursuant to a compact on off-reservation land taken in trust by the United States after October 17, 1988.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 136 F.3d 469. The first opinion of the district court (Pet. App. 13-23) is reported at 914 F. Supp. 1496. The second opinion of the district court (Pet. App. 24-33) is reported at 940 F. Supp. 1139.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998. A petition for rehearing was denied on April 1, 1998. Pet. App. 34. The petition for a writ of certiorari was filed on June 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, established a framework for the regulation of gaming on Indian land. IGRA divides gaming into three categories. Class I gaming encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. 2703(6). Such gaming is subject to the exclusive jurisdiction of the Tribes and is not subject to regulation under IGRA. 25 U.S.C. 2710(a)(1). Class II gaming includes bingo and similar games, 25 U.S.C. 2703(7), and is subject to tribal regulation and federal oversight by the National Indian Gaming Commission, 25 U.S.C. 2710(a)-(c), 2706(b). Class III gaming encompasses all other forms of gaming, 25 U.S.C. 2703(8), and includes slot machines, casino games, banking card games, dog racing, and lotteries. Class III gaming is lawful only if it is (1) authorized by a tribal ordinance, (2) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (3) conducted in conformance with a Tribal-State compact. 25 U.S.C. 2710(d)(1).

In addition, except in limited circumstances, "gaming regulated by [IGRA] shall not be conducted on [off-reservation] lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988" (after-acquired land). 25 U.S.C. 2719. One of the circumstances in which such gaming may be conducted is when "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would

be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A).

2. In September 1990, a tract of land in Marquette County, Michigan, was taken into trust by the United States for the benefit of the Keweenaw Bay Indian Community (petitioner). Pet. App. 2. In 1993, petitioner and the State of Michigan entered into a Tribal-State compact which permits Class III gaming on "Indian lands." *Ibid.* The compact specified that it would take effect upon the fulfillment of certain conditions, including endorsement by the Governor of Michigan and approval by the Secretary of the Interior. *Ibid.* All specified conditions were fulfilled. *Ibid.*

In August 1994, petitioner sought approval from the Secretary of the Interior to operate a Class III casino gaming operation on the Marquette County property. Pet. App. 3. The Bureau of Indian Affairs (BIA) informed petitioner that it would have to satisfy the requirements set forth in Section 2719 before Class III gaming operations could commence. *Ibid.* Petitioner opened the facility on the Marquette County property without complying with Section 2719. *Ibid.*

Petitioner subsequently filed suit in the United States District Court for the Western District of Michigan against the United States seeking declaratory and injunctive relief that would permit Class III gaming on the Marquette County property. Pet. App. 3. The United States filed a counterclaim against the Tribe. *Ibid.* It sought (1) a declaration that the gaming activities at petitioner's casino violate state and federal law; (2) an injunction preventing petitioner from licensing,

authorizing or operating a Class III gaming facility until the requirements of 25 U.S.C. 2719 had been met; and (3) abatement of the gaming and confiscation of the unlawful gaming devices. *Ibid.*

The district court granted summary judgment in favor of petitioner. Pet. App. 13-23. The district court ruled that the requirements of 25 U.S.C. 2719 do not apply to petitioner's Marquette County gaming operation. Pet. App. 21. The court reasoned that Section 2719 applies only to gaming "regulated by" IGRA, and that the Marquette County gaming operation is regulated by petitioner's compact with the State of Michigan and not by IGRA. *Ibid.* The district court also concluded that it would be "nonsensical" to require compliance with 25 U.S.C. 2719, because such compliance would require petitioner to obtain two approvals each from the Governor of Michigan and the Secretary of the Interior. *Ibid.*

The United States moved for reconsideration, and the State of Michigan intervened and filed a similar motion. Pet. App. 3. The district court denied the motions for reconsideration. *Id.* at 24-33.

3. The court of appeals reversed. Pet. App. 1-12. The court held that the approval requirements in Section 2719 apply to petitioner's Marquette County gaming operation. *Id.* at 7. The court of appeals rejected the district court's view that Class III gaming conducted pursuant to a compact is not "regulated by" IGRA within the meaning of Section 2719. *Ibid.* The court of appeals explained that "any gaming subject to a tribal-state compact is necessarily regulated by the IGRA," because "the compact mechanism is created and governed by the IGRA" and because "provisions of the IGRA other than the compact provisions regulate compact-authorized gaming." *Id.* at 7. The court of

appeals noted (*ibid.*) that the Chairman of the National Gaming Commission has the power to approve pre-1988 Class III tribal gaming ordinances, 25 U.S.C. 2712(a), and that the National Indian Gaming Commission has power to levy civil penalties and to order temporary closure of Indian gaming, 25 U.S.C. 2713.

The court of appeals also rejected the district court's conclusion that it would be "nonsensical" to apply Section 2719 to gaming authorized by a compact because it would require the Secretary of the Interior and the Governor of a State to approve such gaming twice. Pet. App. 9-10. The court of appeals noted that the two approvals by the Secretary of the Interior involve different considerations. The Secretary must approve a Tribal-State compact under Section 2710 unless the compact violates a provision of IGRA, another federal law, or the United States' trust obligations to a Tribe. 25 U.S.C. 2710(d)(8)(B). Pet. App. 9. In contrast, in circumstances like those presented here, the Secretary may approve gaming on after-acquired land only if "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [the Secretary] determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and only "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." *Ibid.* (quoting 25 U.S.C. 2719(b)(1)(A)). The court also concluded that "the Michigan Governor's endorsement of the compact per the terms of the compact itself is * * * of a qualitatively different nature from his concurrence in the Interior's Secretary's discretionary 'best-interests waiver' of [Section]

2719's general gaming prohibition." Pet. App. 10 (citation omitted).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that Class III gaming authorized by a compact is not subject to the requirements set forth in Section 2719 for the conduct of gaming on off-reservation, after-acquired land. That contention is without merit and does not warrant review.

Section 2719(a) provides that, subject to certain exceptions, "gaming regulated by this subchapter shall not be conducted" on off-reservation, after-acquired land. 25 U.S.C. 2719(a). By its plain terms, Section 2719 applies to all gaming regulated by IGRA; there is no exception for Class III gaming conducted pursuant to a compact.

Petitioner contends (Pet. 6) that Section 2719 does not apply to gaming authorized by a compact, because such gaming is "regulated by" the compact and not by IGRA. As the court of appeals concluded, however, gaming subject to a compact is "necessarily regulated by" IGRA, because "the compact mechanism is created and governed by the IGRA," and because "provisions of the IGRA other than the compact provisions regulate compact-authorized gaming." *Id.* at 7. For example, as the court of appeals noted (*ibid.*), the National Indian Gaming Commission has power to levy civil penalties and to order temporary closure of such gaming. 25 U.S.C. 2713. Section 2719 therefore unambiguously applies to compact-authorized gaming, and such gaming may not be conducted on off-reservation, after-acquired land unless one of the exceptions to Section 2719 is applicable.

Applying Section 2719 to compact-authorized gaming does not, as petitioner asserts, "diminish[] the central importance of the tribal-state compact in the statutory scheme." Pet. 6. A valid Tribal-State compact is a necessary condition for all Class III gaming. 25 U.S.C. 2710(d)(1). In light of the special considerations involved in expanding gaming to off-reservation after-acquired land, however, Section 2719 introduces an additional set of requirements before gaming regulated by IGRA may be conducted on such land. In particular, in circumstances like those presented here, Class III gaming may be permitted only if "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and only if "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A). The existence of a valid compact does not eliminate the need to conduct that special inquiry, which takes into account local interests that are not taken into account in the compact approval process. Indeed, since Class III gaming is not authorized under IGRA on *any* Indian lands in the absence of a valid compact, petitioner's contention would have the implausible effect of rendering the special requirement of Section 2719 totally inapplicable to Class III gaming.

2. Petitioner errs in suggesting (Pet. 7) that the decision below conflicts with *Wisconsin Winnebago Nation* v. *Thompson*, 22 F.3d 719, 723 (7th Cir. 1994), and *Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.) cert. denied, 513 U.S. 919 (1994).

Neither of those cases involved Class III gaming on off-reservation land acquired after October 17, 1988. *Wisconsin Winnebago Nation*, 22 F.3d at 722; *Narragansett Indian Tribe*, 19 F.3d at 689. The courts in those cases therefore had no occasion to address the question resolved by the court of appeals in this case—whether the requirements in Section 2719 apply to compact-authorized gaming on off-reservation, after-acquired land. Consistent with the plain language and purposes of Section 2719, the court of appeals in this case correctly held that Section 2719 applies to such gaming, and the court's holding does not conflict with a decision by any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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